(29,884)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. 574

A. J. OLIVER, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF WEST COAST RUBBER CORPORATION; OSCAR COURTIN, DOROTHY E. KNIGHT, ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA AND CITY AND COUNTY OF SAN FRANCISCO

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 27, 1924

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In the United States Circuit Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, a Sovereign Corporation, and THE CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation,

Petitioners,

vs.

A. J. OLIVER, as Trustee, and OSCAR COURTIN, DOROTHY E. KNIGHT, C. S. SANFORD, D. C. TUHEY, H. BLACK, and HUGH V. CASSERLY,

Respondents.

In the Matter of WEST COAST RUBBER CORPORATION, INC., a Corporation, Bankrupt.

Petition to Revise.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

Petition of the United States of America, a sovereign corporation, and the City and County of San Francisco, a municipal corporation, respectfully shows:

I.

That said United States of America is a sovereign corporation, and that said City and County of San Francisco is a municipal corporation, duly organized and existing under and by virtue of the laws of the State of California.

II.

That heretofore, to wit, on the 22d day of January, 1922, the proceedings therefor duly had, the said West Coast Rubber Corporation, Inc., was duly adjudged a bankrupt by the order of the District Court of the United States in and for the Southern Division of the Northern District of California on said date duly given and made. That on said day said District Court duly gave and made an order conferring all further proceedings in said matter to the Honorable A. B. Kreft, Referee in Bankruptcy of said District Court within the City and County of San Francisco, State of California, before whom all further proceedings in the matter of such bankruptcy had been had.

III.

That on the 11th day of February, 1922, the above-named A. J. Oliver was elected trustee in such bankruptcy proceeding, and that on the 21st day of February, 1922, he duly filed his bond as such trustee, which said bond was duly and regularly approved and sent to the Clerk of said District Court, and on said last-named date he duly qualified as such trustee.

IV.

That at and before the filing of said petition in bankruptcy, said West Coast Rubber Corporation, Inc., was justly and truly indebted to your petitioner the United States of America in the sum of $2158.15 upon manufacturer's excise taxes due under section 900 of the Revenue Act of 1918, and $889.86 penalties due upon such taxes and accord-

ing to the provisions of such section; and to the petitioner, the City and County of San Francisco in the sum of $876.18, personal property taxes for the year 1921, and $131.43 penalty upon such taxes. That neither said petitioners, nor any person upon their order or the order of either of them, has received any manner of security for said debts or either or any of them, and that each of your petitioners owns an unsecured claim provable in bankruptcy against said bankrupt and is a creditor of said bankrupt.

V.

That each of your petitioners has duly filed herein its claim and proof of claim against said bankrupt in the sums due respectively, as hereinabove set forth, and in due form as required by law duly verified by it, and that no objection or *or* opposition has been made to either of said claims or to said proofs of claim, except as hereinafter mentioned, and each of said claims was duly allowed and approved by said Referee. That the claim of said United States of America was filed on the 24th day of March, 1922, and the claim of said City and County of San Francisco was filed on the 18th day of March, 1922.

VI.

That each of the petitioners by and in their claims and proofs of claim, claim and claims and is entitled to priority in payment over all other debts and claims against said bankrupt under and by virtue of the provisions of the Bankruptcy Act of the United States, for the reason that said claim

of the United States of America is for taxes legally due and owing by the bankrupt to the United States, and that the claim of said City and County of San Francisco is for taxes legally due to the County and Municipality.

VII.

That on the 14th day of April, 1922, the said Referee made and filed his order, opinion, finding and rulings that certain labor claims filed in said bankruptcy proceeding, to wit, the claim of Oscar Courtin for $200, the claim of Dorothy E. Knight for $225, the claim of C. S. Sanford for $225, the claim of D. C. Tuhey for $285, the claim of H. Black for $70, and the claim of Hugh V. Casserly for $200, had and have priority over and should be, and were by such order, ordered to be paid in priority and in advance of the claims of these petitioners. That all claims against said bankrupt filed in such bankruptcy proceeding, except the claims hereinabove mentioned, are claims of general creditors, and that there are no claims against said bankrupt entitled to any priority of payment except claims of petitioners and respondents as hereinabove set forth, and the expenses of the administration of the estate of said bankrupt. That there are not sufficient funds and/or property in the estate of said bankrupt to pay expenses of the administration of said estate, the claims of petitioners, and labor claims as hereinabove set forth. And that if such labor claims are paid in advance and in priority to the claims of these petitioners, a substantial part of the claims of petitioners must

remain unpaid. That after the 14th day of April, 1922, these petitioners presented and filed in the said District Court their petition for review of said last-mentioned order of said Referee, which petition was duly heard, and that on the 8th day of July, 1922, said District Court gave, made and entered its opinion and order affirming said last-mentioned opinion and order of said Referee, and ordered the payment of said labor claims in advance of and in priority to said claims of petitioners. That petitioners have filed herewith copies, duly certified of the respective claims of petitioners, and of all orders and documents hereinbefore referred to, and the same are hereby referred to and made a part hereof.

VIII.

And your petitioners herein allege that the said Referee in making said order, opinion, findings and rulings as aforesaid, and the said District Court in affirming the order and decision of said Referee as aforesaid, erred in the following particulars as a matter of law, to wit:

(a) In directing the payment of such labor claims in advance of the payment of the claims of these petitioners.

(b) In ruling that labor claims should be paid in such bankruptcy proceeding in advance of the payment of taxes due the United States and the City and County of San Francisco.

(c) In ruling that such labor claims should be paid in advance of the payment of taxes due the United States of America.

(d) In ruling that such labor claims be paid in advance of the payment of taxes due the City and County of San Francisco.

(e) In ruling that dividends to creditors do not include payment in full to creditors.

(f) In determining that dividends to creditors do not include dividends to labor claimants.

(g) In ruling and determining that said labor claims should be paid in advance of and in priority to said claims of petitioners.

(h) In ruling and determining that said labor claims should be paid in advance of and in priority to those portions of the claims of petitioners which are for and on account of penalties.

WHEREFORE, your petitioners feel aggrieved because of such orders and each of them, and ask that the same and each of them be revised in matter of law as provided in section 24–B of the Bankruptcy Act of the United States, and the rules and practices in such case made and provided.

JOHN T. WILLIAMS,
United States Attorney,
JAMES RALEIGH KELLY,
Asst. United States Attorney,
Attorneys for Petitioner, United States of America.

GEORGE LULL,
City Attorney,
E. J. MITCHELL,
Assistant City Attorney,
Attorneys for Petitioner, the City and County of San Francisco.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

James Raleigh Kelly, being first duly sworn, deposes and says that he is Assistant United States Attorney for the Northern District of California; that he has read the foregoing Petition to Revise and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated on information and belief and as to these matters he believes it to be true.

JAMES RALEIGH KELLY.

Subscribed and sworn to before me this 8th day of January, 1923.

[Seal] FRANCES KRULL,
United States Commissioner, Northern District of California.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Mervin C. Lernhart, being first duly sworn, deposes and says, that on the 9th day of January, 1923, he served a copy of the foregoing petition to revise upon ~~A. J. Oliver,~~ M. C. L. ~~Trustee,~~ and R. G. Hunt, attorney for said trustee, and upon Louis P. Hunkley, attorney for respondents, Oscar Courtin, ~~Dorothy~~ ~~D. Knight,~~ ~~C. S. Sanford,~~ D. C. Tuhey, ~~H. Black,~~ and Hugh V. Casserly, by personally delivering a copy of the said petition, and of the notice of petition filed therewith.

MERVIN C. LERNHART.

Subscribed and sworn to before me this 9th day of January, 1923.

[Seal] F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. United States of America, etc., et al., Petitioners, vs. A. J. Oliver, etc., et al., Respondents. In the Matter of West Coast Rubber Corporation, Inc., a Corporation, Bankrupt. Petition to Revise. Filed Jan. 9, 1923. F. D. Monckton, Clerk.

Receipt of a copy of the within petition to revise is hereby admitted this 9th day of January, 1923.

R. G. HUNT,
Attorney for Trustee.
LOUIS P. DUNKLEY,
Attorney for Respondents Oscar Courtin, D. C. Tuhey, and Hugh V. Casserly.

In the United States Circuit Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, etc., et al.,
Petitioners,

vs.

A. J. OLIVER, as Trustee, et al.,
Respondents.

In the Matter of WEST COAST RUBBER CORPORATION, INC., a Corporation, Bankrupt.

Notice of Filing of Petition to Revise.

To A. J. Oliver, Trustee, Reuben Hunt, His Attorney, and Oscar Courtin, D. C. Tuhey, and Hugh V. Casserly, and Louis P. Dunkley, Their Attorney:

You will please take notice that the undersigned on January 9th, 1923, filed in the United States Circuit Court of Appeals for the Ninth Circuit a petition to revise that certain order of the District Court of the United States, Southern Division of the Northern District of California, made and entered on the 8th day of July, 1922, whereby the said District Court affirmed the decision of the Referee of the above-entitled proceeding, declaring that the claims of the respondents, other than said trustee, should be paid in priority to the claims of petitioners.

JOHN T. WILLIAMS,
United States Attorney,
JAMES RALEIGH KELLY,
Assistant U. S. Attorney,
Attorneys for Petitioner, United States of America.

GEORGE LULL,
City Attorney,
E. J. MITCHELL,
Assistant City Attorney,
Attorneys for Petitioner, City and County of San Francisco.

[Endorsed]: In United States Circuit Court of Appeals for the Ninth Circuit. United States of America, etc., et al., Petitioners, vs. A. J. Oliver, etc., et al., Respondents. In the Matter of West Coast Rubber Corp., Inc., a Bankrupt. Notice of Filing of Petition to Revise.

Receipt of a copy of the within notice of filing of petition to revise is hereby admitted this 9th day of January, 1923.

R. G. HUNT,
Attorney for Trustee.
LOUIS P. DUNKLEY,
Attorney for Respondents, D. C. Tuhey, Oscar Courtin and Hugh V. Casserly.

In the United States Circuit Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, a Sovereign Corporation, and THE CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation,

Petitioners,

vs.

A. J. OLIVER, as Trustee, and OSCAR COURTIN, DOROTHY E. KNIGHT, C. S. SANFORD, D. C. TUHEY, H. BLACK and HUGH V. CASSERLY,

Respondents.

In the Matter of WEST COAST RUBBER CORPORATION, INC., a Corporation, Bankrupt.

Answer to Petition for Revision.

To the Above-entitled Court:

A. J. Oliver, as Trustee in Bankruptcy of the estate of the above-named West Coast Rubber Corporation, Inc., a Corporation, and Oscar Courtin, Dorothy E. Knight, C. S. Sanford, D. C. Tuhey, H. Black and Hugh V. Casserly, Respondents in the above-entitled proceeding, present herewith their answer to the petition to revise filed herein by the United States of America, a Sovereign Corporation, and the City and County of San Francisco, a Municipal Corporation, on the 8th day of January, 1923, and in that behalf in respect to the allegations of said petition admit, deny and allege as follows:

I.

Admit all of the allegations contained in Paragraphs I, II, and III.

II.

As to the allegations contained in Paragraph IV respondents admit all of the same with the exception that they deny that the bankrupt was indebted to the United States of America at the time of the filing of the petition in bankruptcy in the sum of Two Thousand One Hundred Fifty-eight and 15/100 ($2,158.15) Dollars upon manufacturer's excise taxes due under Section 900 of the Revenue Act of 1918, and in this behalf respondents allege that the exact amount due upon such manufacturer's excise taxes to the United States Government was One Thousand Eight Hundred Fifty-one and

66/100 ($1,851.66) Dollars and no more, plus penalties.

III.

As to the allegations contained in Paragraph V respondents admit the same with the exception that they deny that no objection or opposition was made to the claims of the petitioners before said referee and in this behalf allege that objections were made by respondents to the principal amount of the claim of the United States of America and to the allowance of penalties upon the claim of the United States of America and upon the claim of the City and County of San Francisco, and that upon a full hearing of all the parties, and on September 23, 1922, the said referee made an order allowing the principal claim of the United States of America at the said sum of One Thousand Eight Hundred Fifty-one and 66/100 ($1,851.66) Dollars and disallowing all penalties thereon and allowing the claim of the City and County of San Francisco at the sum of Nine Hundred Four and 26/100 ($904.26) Dollars and disallowing all penalties thereon, and that the time within which such order of the referee could be reviewed as provided by law has long since expired and no review was taken thereon and said order has become final.

IV.

As to the allegations contained in Paragraph VI respondents deny that petitioners, or either of them, are entitled to priority in payment over all other debts and claims against said bankrupt under

and by virtue of the provisions of the Bankruptcy Act of the United States, and in this behalf allege that the claims of petitioners are subordinate to claims for labor and attachment costs and prior only to dividends to general unsecured creditors.

V.

As to the allegations contained in Paragraph VII respondents admit the same with the exception that they allege the labor claims referred to therein were allowed by said referee in the following amounts and no more:

Oscar Courtin	$200.00
Dorothy E. Knight	150.00
D. C. Tuhey	285.00
H. Black	82.85
Hugh V. Casserly	200.00
C. S. Sanford	Disallowed

and deny that there are no claims against said bankrupt entitled to any priority of payment except the claims of petitioners and respondents as set forth in said petition and the expenses of administration of the estate of the bankrupt and in this behalf allege that there are also entitled to priority of payment, subsequent to labor claims and prior to taxes, certain attachment costs claims allowed by the said referee in his order of the 14th of April, 1922, viz.:

Oscar Courtin	$ 7.50
Dorothy E. Knight	4.90
D. C. Tuhey	8.65
Hugh V. Casserly	78.65

Respondents further allege that the district court in its order of July 8, 1922, affirming the order of the referee ordered the payment of labor and attachment costs claims in advance of the claims of petitioners.

VI.

As to the allegations contained in Paragraph VIII of said petition respondents deny that the said referee and the said District Court, or either of them, committed all or any of the errors specified in said Paragraph VIII.

WHEREFORE respondents pray that said petition for revision be denied.

REUBEN G. HUNT,
Attorney for Respondents.

State of California,
City and County of San Francisco,—ss.

A. J. Oliver, being first duly sworn, deposes and says:

That he is one of the respondents in the above-entitled matter; that he has read the foregoing Answer and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated on information or belief and as to those matters that he believes it to be true.

A. J. OLIVER.

Subscribed and sworn to before me this 18th day of January, 1923.

[Seal] J. D. BROWN,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: No. 3966. In the United States Circuit Court of Appeals for the Ninth Circuit. United States of America, a Sovereign Corporation, et al., Petitioners, vs. A. J. Oliver, as Trustee, et al., Respondents. In the Matter of West Coast Rubber Corporation, Inc., a Corporation, et al., Bankrupt. Answer to Petition for Revision. Filed Jan. 24, 1923. F. D. Monckton, Clerk.

Receipt of a copy of the within answer is hereby admitted this 24th day of January, 1923.

JOHN T. WILLIAMS,
JAMES RALEIGH KELLY,
Attorneys for U. S. Govt.
E. J. MITCHELL,
GEORGE LULL,
Attorneys for City and County of San Francisco.

No. 3966

United States

Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of WEST COAST RUBBER CORPORATION, INC., a Corporation, Bankrupt.

THE UNITED STATES OF AMERICA and THE CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation,

Petitioners,

vs.

A. J. OLIVER, as Trustee, and OSCAR COURTIN, DOROTHY E. KNIGHT, C. S. SANFORD, D. C. TUHEY, H. BLACK, and HUGH V. CASSERLY,

Respondents.

Transcript of Record

IN SUPPORT OF THE

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, an Order of the Southern Division of the United States District Court for the Northern District of California, First Division.

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 12,338.

In the Matter of WEST COAST RUBBER CORPORATION, INC., a Corporation, Bankrupt.

Praecipe for Transcript of Record.

To Walter B. Maling, Clerk of said District Court.

Please prepare certified copy of the following documents:

(1) All papers contained in file entitled: "Papers accompanying Referee's certificate upon petion to review." To wit:

(a) Opinion and order of Kreft, Referee on priority of claims.

(b) Proof of debts due City and County of San Francisco and affidavit of John Ginty.

(c) Claim of United States Government for debt.

(d) Trustee's written objection to claims.

(e) Petition of United States filed on or after May 2, 1922, for review of Referee's order of April 7, 1922.

(f) Petition of City and County of San Francisco filed about May 24, 1922, for review of same order.

(2) Referee's certificate upon petition to review order disallowing claims.

(3) Opinion and order affirming order of Referee directing payment of certain claims in advance of tax claims by the United States and the City and County of San Francisco.

(4) Copy of this praecipe.

JOHN T. WILLIAMS,
United States Attorney.

[Endorsed]: Filed Jan. 6, 1923, 11:30 A. M. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
FORM 822 (Revised March, 1921)

Demand is hereby made for the payment of the taxes, penalties, and interest stated in this notice. If the taxes, penalties, and interest are not paid within ten days, it will be my duty to collect them with costs, by seizure and sale of property.

DATE—MAR. 21, 1922

To Avoid seizure and sale of property the amount stated in this notice must be paid to Collector of Internal Revenue at SAN FRANCISCO within ten days from the date stated above.

NOTICE AND DEMAND FOR SALES TAX
TO THE COLLECTOR OF INTERNAL REVENUE

ORIGINAL. COLLECTORS "PAID" STAMP.

I inclose herewith remittance covernig tax, penalties, and interest itemized below:

Tax		$.....
Penalty 25%		$.....
Penalty 5%		$.....
Interest.....	Month Assessed	$.....
Interest.....	Months Additional	$.....
	Total.....	$.....

(Signature of Taxpayer)

NAME AND ADDRESS	ITEMS	PAID	ASSESSMENT	DESCRIPTION	
	2158.15		3048.01	Tax Aug '20—Oct '21 inc	
West Coast Rubber Corpn.,	539.30			25% Pen	0–5
33 Dolores St.,	107.26			5%	
San Francisco, Cal.	243.30			Interest,	
				Feb 1922, ATD 728, 54–0	

RETURN THIS FORM WITH REMITTANCE.

In the District Court of the United States, for the Northern District of California.

IN BANKRUPTCY—No. 12,338.

In the Matter of WEST COAST RUBBER CORPORATION, Bankrupt.

Proof of Claim of United States Government.

At the City and County of San Francisco, State of California, in the Northern District of California, on the 22d day of March, 1922, came John P. McLaughlin, Collector of Internal Revenue, for the first District of California, and made oath and says that the West Coast Rubber Corporation, the firm against whom a petition for adjudication of bankruptcy was filed was, at and before the filing of said petition, and still is, justly and truly indebted to the said Collector of Internal Revenue, for the First District of California, in the sum of three thousand forty-eight and 1/100 ($3,048.01) dollars; that consideration of said debt being as follows: Manufacturers' Excise Tax due under section 900 of the Revenue Act of 1918, for the period from August, 1920, to and including October, 1921, as is more fully set forth in the form 822, used by the said United States Government to notify taxpayers of delinquency, and the assessment list forwarded to the Collector of Internal Revenue, by the Commissioner of Internal Revenue, appearing on said list for the month of February, 1922, page O, line O; that no part of said debt has been paid and the tax is computed as follows:

1920	Tax	25%	5%	Int.	Total
Aug.	$ 27.98	$ 6.99	$ 1.38	$ 5.82	$ 42.17
Sept.	7.78	1.95	.36	1.51	11.60
Oct.	284.67	71.17	14.23	51.81	421.88
Nov.	9.16	2.04	.45	1.51	13.16
Dec.	44.67	11.17	2.23	6.97	65.04
1921					
Jan.	148.88	37.22	7.44	20.85	214.39
Feb.	230.87	57.72	11.54	30.01	330.14
Mar.	440.63	110.16	22.03	51.55	624.37
Apr.	219.65	54.91	10.48	22.80	307.84
May	207.66	51.91	10.38	18.90	288.85
June	138.47	34.62	6.92	10.80	190.81
July	127.61	31.90	6.38	8.29	174.18
Aug.	161.51	40.38	8.07	8.40	218.36
Sept.	97.19	24.30	4.80	3.79	130.08
Oct.	11.42	2.86	.57	.29	15.14
	$2158.15	539.30	107.26	243.30	3048.01

on which amount there are no setoffs or counterclaims, and that deponent has not, nor has any person by his order, or to his knowledge or belief, had or received any manner of security for said debt whatever, nor has any judgment been rendered thereon.

JOHN P. McLAUGHLIN,
Collector of Internal Revenue.

Subscribed and sworn to before me this 22d day of March, A. D. 1922.

W. G. WALKER,
Deputy Collector.

[Endorsed]: Filed Mar. 24, 1922, at 11 o'clock and 30 min. A. M. A. B. Kreft, Referee in Bankruptcy.

...M., Open Evenings until 12 P.M., from March 5 to June 1 except Saturday, for Receiving Tax Statements (no Taxes Received after 5 P.M.)

NOTICE—This statement must be brought by you in person to the Assessor's Office and there sworn to within 10 days following the date of this demand or you will be liable to an Arbitrary Assessment.

STATEMENT as of 12 o'clock Meridian, on the first Monday in March, 1923 (March 5th, 1923), of all Taxable Personal Property owned, or controlled by, or in the possession of

(Name of Firm or surname of Individual) West Coast Rubber Corp (First name or initials of Individual)

N. B. Be sure and give street location where the property is stored or located in San Francisco, so as to prevent double Assessment.

This statement is the Assessor's demand, under Sec. 3629, for you to fill out as printed and return to the Assessor's office within ten days, and pay the taxes at that time unless secured by Real Estate.

1922

Entered By	Notice Sent	Field Book	District	Entered By
Volume No.	No. 1	Route Page 30	84	
Page No.	No. 2	51		
Line No.	No. 3	Index Page		

RESIDENCE _____ STREET.

PLACE OF BUSINESS NO. 33 Dolores STREET.
and address of the different places where the property is stored or located in San Francisco, Cal.

COLUMN 1

All the following direct questions must be answered "Yes" or "No." *DO NOT ENTER CENTS.*

Value in Dollars Only (Do not enter cents)

Deposits in Commercial Banks	
Commercial Deposits in Savings Banks	
Commercial Deposits in Trust Companies	
Debts due me, such as Accounts, Notes, etc., not secured by mortgage on Real Estate	5600
Total amount of Solvent Credits	11053
Less debts due by me to bona fide Residents of Cal. not secured by Deed of Trust or Mortgage on Real Estate, debts due to Non Residents not deductible	95000
Balance Assessable (Do not include Savings Deposits in above items)	
Money on hand and in Safe Deposit Boxes	2295
Bonds and Stocks of Corporations whose property is outside of Cal. (Itemize same in Column 3 on the back of this Sheet.)	
Household Furniture No. ____ of rooms furnished	
Jewelry ____ Plate ____ Diamonds ____ Watches	
Library, Law ____ Medical ____ Mixed	
Paintings ____ Statuary ____ Bricabrac	
Billiard Tables ____ Sewing Machines ____ Fire Arms	
Musical Instruments, Pianos, etc.	
Live Stock No. ____ Kind and Value	
Horse Trucks No. ____ Wagons ____ Carriages	
Harness ____ Saddles	
Do you own any Real Estate in this County No—Yes (omit value)	
Autos., Auto Trucks Aeroplanes, Motor Cycles and Lic. Nos. to be entered in column Three (3) on the back of this sheet, also other property not enumerated on this page	
Footings Carried to Column 2, Line 45	2295

COLUMN 2

List of Personal Property—Continued.

Value in Dollars Only (Do not enter cents)

28.	Notice.—Debts cannot be deducted from any other account except solvent credits		
29.	and never from Merchandise		
30.	Merchandise, Goods, Wares, and of what kind Bonner Inner Tubes		8000
31.	50%		4000
32.	Goods in Warehouse and where stored (Itemize in Column 3) 142 Beale St		2000
33.	at 50%		1000
34.	Consigned Goods (Itemize in Column 3) no 1235		
35.			
36.	Sec. 428 of the Penal Code makes it a misdemeanor ($500 fine and imprisonment) to refuse to file this statement. See Column Penalties printed on the		
37.	back of this sheet		
38.			
39.	Fixtures, Store, Office, Saloon or Restaurant		
40.	Cash Register no Typewriters 1 @ $39 Safes 1 @ $39 Adding Machs		
41.	Presses no Printing no Hay no		2840
42.	Machinery, etc @ 25%		4136
43.	Other personal property (Itemize in Column 3)		1890
44.	Footings Column 2, line 44		43276
45.	Footings Column 1, line 27		22955
46.	Footings Column 3, line 95		4165
47.	Less claim for exemption under the Constitution. Total		4995
48.	Sec. 13¼. Veteran's Affidavit must be filed each year		2325
49.	Sec. 10¾. Individual Householder's Claim		
	Corporation or partnership cannot claim above exemption. Claims for exemptions must be filed each year. Assessor cannot make the deduction for you.		
50.	Property escaped previous year		2525
51.	Total Net Assessment		49705

5553 Franklin
COLLECT FROM West Coast Rubber Corp
AT 33 Dolores St. City

PARTICULAR KIND OF BUSINESS	WHOLESALE W	RETAIL R	IMPORTERS I
Rubber Business			

NOTICE

Demand is hereby made, that you return this statement in accordance with the instructions hereon within ten days from date of demand.

If you have no assessable Personal Property in this city and county, you are required by law to make a written statement under oath to that effect or your name may be put on the arbitrary list.

JOHN GINTY, Assessor.

By M Sagehorn Deputy.

Date of Demand, San Francisco, 3/1 1923.

Office Hours from March 1st to June 1st, 8:30 A. M. to 12 P. M. except Saturdays, when the office closes at 4 o'clock. No taxes received after 5 P. M.

STATE OF CALIFORNIA, }
CITY AND COUNTY OF SAN FRANCISCO. } ss.

I do swear, that I am a resident of the City and County of San Francisco, that the foregoing list contains a full and correct statement of all property subject to taxation which I (or any firm of which I am a member, or any corporation, association or company of which I am President, Cashier, Secretary, or Managing Agent), owned, claimed, possessed, or controlled at 12 o'clock M., on the first Monday in March, 1923, and which is not already assessed this year; and that I have not in any manner whatsoever transferred or disposed of any property, or placed any property out of said county, or my possession, for the purpose of avoiding any assessment on the same, or of making this statement, and that the debts herein stated as owing by me, are owing to bona fide residents or firms or corporations organized under the laws of this State.

Personal signature of the person R. L. Sanford Asst Secty

(Do not sign the corporation name. Underline above title of office you hold in the corporation.)

The above Oath must be administered by the Deputy Assessor and signature made in his presence. Notary Public acknowledgment not acceptable.

Subscribed and sworn to before me this 15 day of March 1923.

H Mann Deputy Assessor.

1919	1920	1921	1922
Examined By	Corrected By	Appraised By	
Warehouse	Compared By	Passed	

TAKE NOTICE.—Full or cash value means, what it is worth to a going concern or what it would cost to duplicate the same in like condition. It DOES NOT MEAN what it would bring at a FORCED SALE. A NEW STATEMENT must be filled out EACH YEAR; the Assessor cannot copy the figures of the previous year. You are urgently requested to give this your earliest attention and avoid the necessity of an arbitrary assessment with no redress if excessive. If you have nothing to assess you must under the law return a statement to that effect. Read Sec. 3633 and 3629 printed on the back of this statement. Also Sec. 429 of the Penal Code making it a misdemeanor to refuse to make a statement.

READ THE LAWS ON THE BACK OF THIS SHEET

ORDER TO SECURE PERSONAL PROPERTY TAXES BY REAL ESTATE

I hereby consent to and request that the assessment of the within named Personal Property be attached to and become a lien on the following Real Estate for which I have a deed:

Lot situate on the ____ side of ____ Street
between ____ Street and ____ Street
known as No. ____ on ____ Street and assessed
last year in Vol. ____ in Block ____ as Lot.
Property purchased on contract cannot be accepted until deed is vested in your name by a recorded deed.

____ Owner.

San Francisco, ____ 1923.

COLUMN 3

For Taxable Property not Itemized in Columns 1 and 2 of this Sheet and Explanatory Items

	Other Personal Property	Value in Dollars Only (Do not enter cents)
54.	Has your wife or have your minor children any separate personal property? (Do	
55.	not include Real Estate) No	
56.	Of what character and value No	
57.	Other property held by me in trust and for whom (Itemize)	
58.		
59.		
60.		
61.	Automobiles, Auto Trucks and Motorcycles	
62.	License No. ..... Make and year	
63.		
64.	Ford Truck 1920 Model	165
65.		
66.		
67.	#32 Bonner Inner Tubes Col 2	
68.	#43 Cole 2 Valve Stems ass Factory	
69.	Equipment	400
70.		
71.		
72.		
73.		
74.		
75.		
76.		
77.		
78.		
79.		
80.		
81.		
82.		
83.		
84.		
85.		
86.		
87.		
88.		
89.		
90.		
91.		
92.		
93.		
94.		
95.	Footings forward to Column 2, Line 46	465

(Do not enter cents)

IMPORTANT to DEPUTIES and TAXPAYERS

Do not enter both residence and business address unless this statement contains items of Personal Property at both addresses. Enter only the address at which the Personal Property described in the statement is to be found.

Assessment Law

Sec. 3629 of the Political Code requires the Assessor to exact from each person a Statement under Oath, (See Sec. 429 under head of Penalties), setting forth specifically all the personal property owned by such person or in his possession or under his control at 12 o'clock M., on the **First Monday in March (March 5, 1923)** showing separately all taxable State, City, County, or other Municipal or Public Bonds, and the taxable bonds of any person, firm or corporation in his possession or under his control, and deposits of money, gold dust or other valuables, in his name or under his control, and the names of the persons with whom such deposits are made, etc.; also all solvent Credits (accounts and notes) due or owing to such person, deducting from this sum total of such credits, such debts, (notes and accounts) only as are unsecured by trust deed, mortgage or lien on real property as may be owing by such person to bona fide residents of this State. No debts shall be so deducted unless the statement shows the amount of such debts, etc. **Sec. 3617 Paragraph 6** requires such deductions to be assessed to bona fide residents of this State. Fill out the statement as printed.

Art. 13 Sec. 10 Const. All property shall be named in the County where located.

If you have no assessable personal property you are required to make statement to that effect under oath. Clerks, bookkeepers, agents or attorneys cannot sign the oath for their principal. "Debts" cannot be deducted from any other item or accounts except credits, and only to be deducted when owing to bona fide residents of this State and are never to be deducted from merchandise (See Sec. 3633 under head of Penalties.)

Sec. 3627. All taxable property must be assessed at its full cash value.

Sec. 3617 defines the term "Value" and "Full Cash Value" to mean the amount at which the property would be taken in payment of a just debt from a Solvent Debtor. (One who is solvent is not obligated to sell at a forced sale, hence it follows the valuation of personal property he owns is what it is worth to a going concern or what it would cost to duplicate the same in like condition.)

Sec. 3632. Every Assessor shall have power to require any person within such Assessor's respective County to make and subscribe an affidavit * * * To subpoena and examine any person in relation to any statement furnished to him, or which discloses property which is assessable in his respective county. * * *

Sec. 3636. All property consigned for sale to any person within this State, from places outside or within this State, must be assessed as other property at the place where stored.

An Act of U. S. Congress passed August 13th, 1804, "provides that Circulating Notes of National Banks, U. S. Legal Tender Notes, and other notes and certificates of the U. S. payable on demand, gold, silver or other coin shall be subject to taxation as money on hand or on deposit under the laws of any State or Territory."

Collection of Personal Property Taxes, when unsecured by Real Estate

Sec. 3820. The Assessor must collect the taxes on all personal property, when in his opinion said taxes are not a lien on Real Estate sufficient to secure the payment of taxes; the same shall be **immediately Due and Payable** upon Assessment and shall be collected by the Assessor.

Sec. 3821. The Assessor may collect the taxes by seizure and sale of any personal property owned by the person against whom the tax is assessed. (The right of seizure and sale was upheld by the Supreme Court of Cala., in the case of Rode vs. Siebe, Cala. Reports, 119.) It is the duty of the Board of Equalization in session from the first Monday to the third Monday of July, to correct any error the Assessor makes and refund the money paid. (See Sec. 3804.) If you think the Assessor is in error, pay the taxes and bring your case before the Board. This is **Your only Legal Remedy.** The law requires the Assessor to collect and turn his books over before the Board meets and he has no authority to change or collect after the board meets, hence he cannot wait for the Board to pass on the assessment.

Sec. 3823. The Assessor will collect taxes on the basis of the rate of the previous year. (If the rate is lowered by the Board of Supervisors the City will refund; if the rate be increased, the Tax Collector will collect the additional amount.)

Sec. 3716. Taxes are a judgment lien and have the effect of an execution. Said lien attaches to the property on the **First Monday of March** at 12 o'clock noon. The judgment is not satisfied nor the lien time over until the taxes are paid.

Art. IV, Chapter V, Sec. 3 of the Charter provides that the City Attorney shall commence and prosecute actions for the collection of taxes when requested by the Tax Collector or Assessor.

Penalties

Penal Code, Sec. 428. Every person who wilfully obstructs or hinders any public officer from collecting revenue taxes, or other sums of money and which officer is by law empowered to collect, is guilty of a misdemeanor.

Sec. 429. Every person who refuses, upon demand to give to any Assessor a list of his property, or to taxation, or swear to such list, or who gives a false name, is guilty of a misdemeanor.

Sec. 3648. Political Code. Any property willfully concealed, removed, transferred, or misrepresented by the owner or agent thereof, to evade taxation, upon discovery, must be assessed at not exceeding ten times its value and the assessment must not be reduced.

Sec. 3633. Provides how the Assessor shall make Arbitrary Assessments, when a person does not make and deliver a statement, and such assessment shall not be reduced by the Board of Equalization.

Sec. 3632. Every person who shall refuse to furnish the statement herein before required or make and subscribe to such affidavit respecting his name, and place of residence, or to appear and testify when requested to do so, shall for each and every refusal and as often as the same is repeated, forfeit to the people of the State the sum of One Hundred Dollars Gold Coin.

S. F. Charter, Art. IV, Chap. 2, Sec. 6. No demand shall be allowed by the Auditor in favor of any Corporation or person in any manner indebted to the City and County without first deducting the amount of any indebtedness which he has notice.

NOTICE

The Assessment Roll of both Real and Personal Property will be open for your inspection in the rooms of the County Board of Equalization (Board of Supervisors) from the first Monday to the third Monday of July, at which time complaints can be made. You should then and there examine the Roll to ascertain the value placed upon your property.

PHILLIPS & VAN ORDEN CO., PRINTERS.

In the District Court of the United States, Southern Division of the Northern District, State of California.

IN BANKRUPTCY—No. 12,338.

In the Matter of the WEST COAST RUBBER CORPORATION, Bankrupt.

Proof of Debt Due Corporation.

At San Frr sco, California, in the said Southern Division of the Northern District of California, on the 16th day of March, A. D. 1922, came Edward F. Bryant of the City and County of San Francisco, State of California, in the said Southern Division of the Northern District of California and made oath and says the he is the Tax Collector of the City and County of San Francisco, State of California, a municipal corporation, organized and existing under the laws of the State of California, and that he is duly authorized to make this proof and says that the said West Coast Rubber Corporation, bankrupt, for whom a petition for adjudication of bankruptcy has been filed was at and before the filing of said petition and is still justly and truly indebted to the said City and County of San Francisco, State of California, a municipal corporation, in the sum of $1007.61. That consideration of the said debt is as follows:

Personal property taxes for the fiscal year beginning July 1st, 1921, and ending June 30th, 1922, as per tax bill attached. That no part of said debts has been paid. That there are no setoffs or

counterclaims to same. That no note has been received for such account, nor any judgment rendered thereon, and that said corporation has not, nor has any person by its order, or to the knowledge or belief, of said deponent for its use, had or received any manner of security for said debt whatever.

EDWARD F. BRYANT,

Tax Collector of the City and County of San Francisco, State of California, a Municipal Corporation.

Subscribed and sworn to before me this 17th day of March, 1922.

[Seal] CHARLES D. O'CONNOR,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Mar. 18, 1922, at 10 o'clock and 15 min. A. M. A. B. Kreft, Referee in Bankruptcy.

EDWARD F. BRYANT, TAX COLLECTOR — CITY HALL

City and County of San Francisco, State of California

UNSECURED PERSONAL PROPERTY TAXES
FISCAL YEAR 1921

NOTICE TO TAX PAYERS—IMPORTANT

Political Code, Section 3790: "The Tax Collector of each County and City and County shall have power and it is hereby made his duty at any time after receiving from the County Auditor the Assessment Books, to collect the taxes due on personal property except when real estate is liable therefor, by seizure and sale of any personal property owned by the delinquent." Approved March 23, 1901.

RECEIVED THE SUM OF $ 1007.61

Rate, City and County and State.....$3.47
Rate at which the Assessor has collected on account 3.18
Rate of balance due..... .29

15% Added Dec. 5, 1921, at 6 P. M.
5% Added April 24, 1922, at 6 P. M., and 50c additional for costs.

Examine this Bill carefully and see that all your property is included and correctly described.

Tax Collector not responsible for Errors.

No receipt valid unless paid at the office, officially stamped, dated, receipted and credit tag torn off.

Assessed to West Coast Rubber Corp.

Address 33 Dolores St. 55-53 Franklin St.

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18	127	13

THIS TAX MUST BE PAID IMMEDIATELY

This balance is occasioned by the amount collected by the Assessor on the rate levied for the Fiscal Year 1920, being less than the rate levied by the Board of Supervisors for the fiscal year 1921. Section 3825 Political Code.

☛ **Be sure and bring this Bill.**

(Term of this Fiscal Year, July 1st, 1921 to June 30th, 1922)

	Unsecured Personal Property Valuation	Unsecured Personal Property Tax
	$ 25250	$ 876 18
Paid Assessor		— —
Balance Due		876 18
15 %		131 43
Costs		
Total		1007 61

Unsecured Personal Property

1921

Assessed to West Coast Rubber Corp.

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	$
Balance	876 18
15 %	131 43
Costs	
Total	1007 61

25

In the District Court of the United States in and for the Southern Division of the Northern District of California, First Division.

IN BANKRUPTCY—No. 12,338.

In the Matter of WEST COAST RUBBER CORPORATION, a Corporation, Bankrupt.

Trustee's Written Objections to Claims.

To the Above-entitled Court:

A. J. Oliver, trustee of the above estate, presents herewith his written objections to the following claims on file in the above-entitled matter.

1. The claim of the City and County of San Francisco, State of California, a municipal corporation, for taxes in the sum of One Thousand Seven and 61/100 ($1,007.61) Dollars. This claim is for personal property tax for the fiscal year 1921. The amount of the tax is Eight Hundred Seventy-six and 18/100 ($876.18) Dollars and there has been added to this amount a penalty of One Hundred Thirty-one and 43/100 ($131.43) Dollars, making a total claim of One Thousand Seven and 61/100 ($1,007.61) Dollars. The trustee alleges that said claim should be allowed for Eight Hundred Seventy-six and 18/100 ($876.18) Dollars and no more.

Certain labor claims and claims for attachment costs have been filed in the above-entitled proceeding, the labor claims asserting priority under Section 64–b (4) of the Bankruptcy Act and the attachment

cost claims asserting priority under Section 64–b (5) of the Bankruptcy Act. The trustee alleges that all labor claims and all claims for attachment costs duly filed and allowed by the court are entitled to be paid in full before the payment of tax claims and payment of the claim of the said City and County of San Francisco.

2. The Claim of the U. S. Government for Three Thousand Forty-eight and 01/100 ($3,048.01) Dollars. This claim is for manufacturer's excise tax due under Section 900 of the Revenue Act of 1918 for the period from August, 1920, to and including October, 1921. The amount of the tax is Two Thousand One Hundred Fifty-eight and 15/100 ($2,158.15) Dollars and there has been added thereto penalties aggregating Eight Hundred Eighty-nine and 86/100 ($889.86) Dollars, making a total claim of Three Thousand Forty-eight and 01/100 ($3,048.01) Dollars. The trustee alleges that said claim should be allowed, if at all, for Two Thousand One Hundred Fifty-eight and 15/100 ($2,158.15) Dollars and no more.

Certain labor claims and claims for attachment costs have been filed in the above-entitled proceeding, the labor claims asserting priority under Section 64–b (4) of the Bankruptcy Act and the attachment cost claims asserting priority under Section 64–b (5) of the Bankruptcy Act. The trustee alleges that all labor claims and all claims for attachment costs duly filed and allowed by the court are entitled to be paid in full before the pay-

ment of tax claims and payment of the claim of the said City and County of San Francisco.

The trustee has no information or belief upon the subject sufficient to enable him to answer the same and placing his denial upon that ground denies that the bankrupt owes the U. S. Government the sum of Two Thousand One Hundred Fifty-eight and 15/100 ($2,158.15) Dollars, or any other sum for said manufacturer's excise tax.

WHEREFORE the said trustee prays that a time and place be fixed for the hearing of these objections and that due notice thereof be given to the claimants whose claims are objected to; that upon such hearing an order be made herein allowing the claim of the City and County of San Francisco for Eight Hundred Seventy-six and 18/100 ($876.18) Dollars, and no more, and disallowing the claim of the U. S. Government for any amount or for an amount exceeding Two Thousand One Hundred Fifty-eight and 15/100 ($2,158.15) Dollars; and that a further order be made that the payment of the claims of the City and County of San Francisco and the U. S. Government for taxes allowed be postponed until all labor claims and claims for attachments costs duly filed and allowed herein have been paid in full; and for such other and further relief as to the Court shall seem meet and proper.

A. J. OLIVER,
Trustee.

REUBEN G. HUNT,
Attorney for Trustee.

State of California,
City and County of San Francisco,—ss.

A. J. Oliver, being first duly sworn, deposes and says:

I am the trustee named in the foregoing written objections to claims. I have read the same and know the contents thereof and the same is true to the best of my knowledge, information and belief.

A. J. OLIVER.

Subscribed and sworn to before me this 6th day of April, 1922.

[Seal] J. D. BROWN,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Apr. 6, 1922, 10 A. M. A. B. Kreft, Referee.

In the District Court of the United States for the Southern Division of the Northern District of California.

In the Matter of WEST COAST RUBBER COMPANY, Bankrupt.

Memorandum Opinion and Order of Referee Disallowing Priority to Certain Claims.

Counsel Appearing:

R. G. HUNT, Esq., for A. J. OLIVER, Trustee.

GEORGE LULL, Esq., by A. J. HEARST, Esq., for City and County of San Francisco.

JOHN T. WILLIAMS, Esq., U. S. Attorney, for the Government.

The REFEREE.—It appears that the assets of this estate have been reduced to money with the exception of some outstanding accounts, and the situation is presented that the fund is insufficient to pay in full all the claims which are by law required to be paid in full, and we have before us four classes of such claims namely: taxes, expenses of administration, labor, and attachment costs. The United States Government has filed a claim in the sum of $3,048.01 upon manufacturer's excise taxes, due under Section 900 of the Revenue Act of 1918, consisting of $2,158.15 tax, and $889.86 penalties. The City and County of San Francisco presented a claim for $1,007.61, being personal property tax for the year 1921, of which $876.18 is for taxes, and $131.43 penalty. The State of California also holds a claim, not presented, for corporation franchise taxes. The trustee has filed objections to the claim of the Government, and of the city, objecting to the penalties charged; and as to the Government objecting to the amount of tax charged. I have concluded at this time, in advance of the hearing upon the tax claims, to decide the questions of order of priority.

On behalf of the labor claimants and attachment cost claims it is contended that such claims must be paid in advance of taxes; also that the expenses of administration precede the payment of taxes. If labor claims are entitled to payment in advance of taxes, these claimants should not be kept waiting pending the determination of the amount payable upon the tax claims. At the present time the

Government has pending before me tax claims exceeding $100,000 arising under the Income Tax Laws. Therefore, owing to the importance of the questions and the conflict of authority I find exists, I will review at some length the holdings of the various courts.

Section 64 of the Bankruptcy Act reads as follows:

"64. *Debts Which Have Priority.*—a. The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the Court.

"b. The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by

the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, and to the bankrupt in voluntary cases, as the Court may allow; (4) wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority."

Paragraph a relates to taxes only, paragraph b relates to "debts" having priority. Taxes are not debts. Meriwether vs. Garrett & Sons, 102 U. S. 472. "Taxes are not debts. It was so held by this Court in the case of Oregon vs. Lane County, reported in 7 Wallace. Debts are obligations for the payment of money founded upon contract, express or implied. Taxes are imposts levied for the support of the Government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement. They operate *in invitum*. Nor is their nature affected by the fact in some States—and we believe in Tennessee—an action of debt may be instituted for their recovery. The form of procedure cannot change their character." State of New Jersey vs. Anderson, 17 A. B. R. 63, 69. It is because taxes are not classified as debts and the provision for their payment is placed in paragraph a in ad-

vance of the payment of debts, paragraph b, that it was held in certain cases that taxes are placed by the Act in a class superior to debts, in fact, must be paid in advance of expenses of preserving the assets and costs of administration. The meaning of the words "except as herein provided" in Section b, wherein it is stated "the debts to have priority *except as herein provided*" is also the subject of difference of opinion. Certain cases indicate that the words "except as herein provided" refer to paragraph a, other cases making a distinction between expenses of administration, etc., covered by Sec. 64 b (1), (2) and (3) and priority labor claims and priority debts mentioned in b (4), (5), and expressing the opinion that the words "except as herein provided" places the taxes mentioned in a after the expenses of administration and before b (4), labor claims. The cases appear to limit the words "except as herein provided" to the provisions of Section 64 only. It is my opinion that such words are not so limited, but that the word "herein" refers to any provision in the Act which requires payments in a different order than set out in Section 64. Section 67 d provides as follows:

"Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall to the extent of such present consideration only, not be affected by this act."

Such liens not affected by this Act embrace a wide scope, vendor's liens, mechanic's and materialmen's liens, landlord liens, mortgages, liens on special funds, liens by way of pledges, attorney's liens, trusts, and many others could be mentioned given by contract or under state laws. Where such liens exist they must be recognized and satisfied in full out of the proceeds of the property to which they attach, in advance of the claims and charges embraced in Section 64. Collier on Bankruptcy (11 Ed.), p. 1052. It is well-established that the trustee cannot sell property free of liens and charge any part of the expenses against the lien claims without consent of the claimant, and where a trustee finds property so encumbered by valid liens, that no equity remains, he should abandon the property as a burdensome asset. It is my conclusion that the words "except as herein provided" refer particularly to the rights given under said Section 67–d, protecting parties holding such liens, and do not refer to an "exception" contained in Section 64 itself. If taxes are given first rank, the result would be that where claims for taxes amount to more than the value of the assets, the bankruptcy court would not be justified in administering the same, but will leave the Government, State, or municipality to enforce their claims in proceedings of their own initiation, in the same manner as it leaves a mortgagee or other lien claimant to realize upon his security in a proceeding of his own initiation where the value of the property is insufficient to pay the lien claim. The fact that

taxes are mentioned first of all in the section of the Act dealing with priorities would to my mind place them in a superior class to payments under Section 64–b, except for the words of the paragraph that the court shall order the trustee to pay all taxes *"in advance of payment of dividends to creditors."* The Supreme Court has said that the word "dividends" here used means "partial payment to general creditors." Before the estate is ready to pay dividends to general creditors its property must be sold, and all payments required by Section 64–b completed. If Congress intended that taxes should precede everything, even the costs of preserving the estate and expense of administration, why were the words "dividends to creditors" used in connection with the provision for their payment. I can find no purpose in the use of these words except to indicate when the taxes are payable out of the funds of the estate. The words "in advance of" in my opinion, mean "next preceding." I refer to the case of City of Richmond vs. Bird (U. S. Sup. Court), 43 A. B. R. 260, 240 Fed. 545, wherein the Supreme Court say:

"Respondents therefore must prevail unless priority over their liens is given by section 64–a to claim for taxes which, under State law, occupied no better position than one held by a general creditor. Section 67–d, Bankruptcy Act, quoted *supra,* declares that liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, shall not be affected by it. Other pro-

visions must, of course, be construed in view of this positive one. Section 64–a directs that taxes be paid in advance of dividends to creditors; and 'dividend' as commonly used throughout the Act means partial payment to general creditors. In section 65–b (Comp. St., sec. 9649), for example, the word occurs in contract to payment of debts which have priority. And as the local laws gave no superior right to the city's unsecured claim for taxes we are unable to conclude that Congress intended by section 64–a to place it ahead of valid lienholders.

"New Jersey vs. Anderson, 203 U. S. 485, 17 Am. B. R. 63, 27 Sup. Ct. 137, 51 L. Ed. 284, is not decisive of any point here contested; it is only adjudged that New Jersey's claim was for a tax within the meaning of section 64–a and entitled to be treated accordingly. See State of New Jersey vs. Lovell (C. C. A. 3d Cir.), 24 Am. B. R. 562, 102 C. C. A. 505, 31 L. R. A. (N. S.) 988." Section 1–a (9), meaning of Words and Phrases, reads: "'creditor' shall include anyone who owns a demand or claim provable in bankruptcy." Although priority labor claims are payable in full, the payment in a broad sense may be termed a "dividend" out of the estate, and as a creditor receiving a dividend the claim would be postponed to taxes. The Supreme Court, however, finds that the word "dividends" is used in the section in question in the restricted sense of "partial payments to general creditors." The Supreme Court refers to the case of State of New Jersey vs. Lovell

(C. C. A. 3d Cir.), 24 A. B. R. 562, 179 Fed. 321, with approval. In that case the question presented concerned the rights of priority between the actual and necessary cost of preserving the estate and the claim of the State of New Jersey for franchise taxes. The Court states that the relative order in which subdivisions a and b of Section 64 are placed is not happy, and indeed tends to mislead. I quote the following from the opinion:

"The question is of grave import, for it is clear that, if the administration of law is to be respected, a court, without power or means to pay for carrying out its orders, must refuse to make such orders; otherwise its helpless jurisdiction will incur merited contempt. By Const. art. 1, Sec. 8, 'Congress shall have power,' etc., to 'establish * * * uniform laws on the subject of bankruptcy throughout the United States.' Now as this power, when exercised, suspends state action (Sturges vs. Crowninshield, 17 U. S. 191, 4 L. Ed. 529), it would seem that Congress, in passing this Bankruptcy Act, intended the Federal courts should exercise exclusive jurisdiction in bankruptcy matters. Is it then possible that Congress, by section 2 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3420), invested the district courts 'with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings * * * to appoint receivers or the marshal, * * * in case the court shall find it absolutely necessary

for the preservation of estates, to take charge of the property of bankrupts,' and, after conferring such enabling power, meant by section 64 to disable the courts from exercising it by depriving them, as is here sought to be done, of the self-respecting power to pay those it had employed to preserve the estate? Indeed, that is a contradiction and construction not to be tolerated unless under stress of impelling necessity. (Quoting Section 64.)

"Now, while the relative order in which subdivisions 'a' and 'b' are placed is not happy, and indeed tends to mislead, yet the general intent of the section is clear. In subdivision 'b' we find the general scheme of awarding priority in advance of dividend creditors. That subdivision makes provision for paying such costs, fees, and liens as are therein provided, and if there are no outstanding taxes the fund is then paid to creditors. But before paying creditors, subdivision 'a' intervenes and makes provision for what, if omitted, has often proved a hardship, if not indeed an abuse in the settlement of decedent and insolvent estates, viz., delay in payment of taxes. Tax collectors, whose power to distrain lapsed when the estate passed into the custody of the law, or who were left to come in as general creditors, were subjected to trying delays. Obviously subdivision 'a' meant that this delay should not occur, and therefore provided that, 'in advance of payment of dividends to creditors,' 'the Court shall order the trustee to pay all taxes legally due and owing by the

bankrupt to the United States, State, county, district or municipality,' and, to prevent delay from questions concerning such taxes, it provided, 'in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the Court.' And yet in case the Court had to take testimony, or order a referee to determine the legality of such tax, the adjudged tax would, under the construction here contended for, absorb the whole fund and leave unpaid the agency by which its payment was effected. Now, whether the 'creditors' referred to in the phrase, 'in advance of the payment of dividends to creditors' places the payment of taxes ahead of dividend creditors alone, or places it also ahead of those creditors who, under subdivisions 4 and 5 of clause 'b,' are paid in full, is a question not before us. It suffices to say that on the question that is before us, namely, whether the taxes of a State are, under clause 'a,' given priority over 'the actual and necessary cost of preserving the estate subsequent to the filing of the petition,' we are clear they are not."

While this case does not decide that labor claims take priority over taxes, the language therein used and the language used by the Supreme Court in which this case is cited, in my opinion, requires such a holding. I find an earlier decision of the Supreme Court which seems to indicate that the payment of taxes precedes labor claims, but the meaning of the words "dividends to creditors" as used in section 64–"a" was not referred to by

the Court in such earlier decision. I refer to the case of Guarantee Title & Trust Co. vs. Title Guaranty & Estate Co., 27 A. B. R. 873, in which it was decided that under the Bankruptcy Act of 1898 labor claims entitled to priority take precedence over a debt also entitled to priority, owing to a party subrogated to the rights of the United States by payment of a judgment obtained against that party as security on a bond given to the United States by the bankrupt. This is an important case upon questions here involved. Certain cases included in citations hereinafter hold that the claims of the sovereign have superior rights over those of the individual. In the case last mentioned the Court reviews various provisions of the Revised Statutes giving priority to debts owing to the United States,—it being conceded for the purpose of the decision that the claimant could assert whatever priority the United States possessed,—and the contention was made that the United States as a sovereign was not bound by the general language of the statute, and was not bound by the provision of the insolvency law unless specially mentioned therein. After reviewing various sections of the Revised Statutes and calling attention to the provision of the Bankruptcy Act of 1867, whch provided that "all debts due to the United States and all taxes and assessments under the laws thereof" were given priority over wages due to any operative clerk or house servant, the Court finds that a different order is prescribed by the Act of 1898, that is, that labor claims are given

priority over debts owing to the United States. I quote the following (p. 878):

"It will be seen, therefore, that by the statute of 1797 (now section 3466) and section 5101 of the Revised Statutes, all debts due to the United States were expressly given priority to the wages due any operative clerk, or house servant. A different order is prescribed by the Act of 1898, and something more. Labor claims are given priority, and it is provided that debts having priority shall be paid in full. The only exception is—'taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality.'

"These were civil obligations, not personal conventions and preference was given to them; but as to debts, we must assume a change of purpose in the change of order. And we cannot say that it was inadvertent. The act takes into consideration, we think, the whole range of indebtedness of the bankrupt—national, State, and individual—and assigns the order of payment. The policy which dictated it was beneficient and well might induce a postponement of the claims, even of the sovereign, in favor of those who necessarily depended upon their daily labor. And to give such claims priority could in no case seriously affect the sovereign. To deny them priority would in all cases seriously affect the claimants."

The expressions of opinion by the Supreme Court as to Section 64 in both of the cases from which I have quoted may be said to be *dicta* so far as application thereof is concerned to the question

of priority between taxes and labor claims. In fact, with the exception of the cases which place taxes at the head of everything, I have found no case passing directly upon the question under consideration.

The Supreme Court here finds that it was the intention of Congress to postpone a debt due the sovereign to the claims of labor. The question at issue carries us further; Has not Congress also intended to postpone the claims of the Government, State or municipality for taxes to the claims for labor, and to claims covered by Section 64–b (5)? Notwithstanding the statement above quoted, referring to debts having priority that "the only exception is 'taxes legally due by the bankrupt to the United States, State, county, district, or municipality,' the construction placed by the Supreme Court upon the words "dividends to creditors" used in Section 64–a in the later case leads me to the conclusion that it is also the intent of Congress to give labor claims under Section 64–b (4), and the claims under Section 64–b (5) precedence over tax claims. The estate is not ready to pay dividends, partial payments to general creditors, until all claims falling under Section 64–b have been fully paid. The case of the Guaranty Co. vs. Title Co., *supra,* however, disposes of the contention that the claims of the Government necessarily take precedence over the claims of the individual by virtue of sovereignty and provisions of the Revised Statutes.

In conclusion I will cite some of the cases which I deem to have a bearing upon the questions at issue. The cases holding that taxes must be paid in advance of all other charges, including expenses of preserving the estate and expenses of administration are: In re Weiss (U. S. Dist. Ct., So. Dist. N. Y.), 20 A. B. R. 247; In re Cramond, 17 A. B. R. 40 (Dist. Ct. N. Y. No. Dist.), 145 Fed. 966; City of Chatanooga vs. Hill (C. C. A. 6th Cir.), 15 A. B. R. 195, 139 Fed. 600; In re Prince and Walter, 12 A. B. R. 675 (U. S. Dist. Ct. for Penns.), 131 Fed. 546.

Cases holding that cost of preserving the estate and expenses of administration are to be paid in advance of taxes: State of New Jersey vs. Lovell (U. S. C. C. A. 3d Cir.), 24 A. B. R. 562, of which I have hereinbefore quoted; In re Halsey Electric Generator Co. (U. S. Dist. Ct. of New Jersey), 23 A. B. R. 401. In this case, referring to the words of Section 64–b, "except as herein provided" the Court says:

> "This phrase 'except as herein provided,' therefore, as far as it relates to taxes, means nothing more than the creditors referred to in classes 4 and 5 are subordinate to taxes in the order of priority in payment. Something more than this phrase must be found to give taxes the priority over everything."

Matter of Jacobson (C. C. A. 7th Cir.), 45 A. B. R. 1, holding that the word "creditors" is limited by the definition of that term by Sec. 1 (9) of the Act, which provides that "creditors shall

include anyone who owns a demand payable in bankruptcy." Also holding that Sec. 3466 U. S. Rev. St. has no application. Matter of Hessler Foundry & Mfg. Co., 45 A. B. R. 832 (Dist. Ct. No. D, of N. Y.).

In re Polk County, Iowa vs. Burns (C. C. A. 8th Cir.), 40 A. B. R. 727.

In re Oxley (Dist. Ct. Wash.), 30 A. B. R. 406.

In regard to the priority for claims presented here covering the attachment costs incurred in the state court proceedings by the claimants shortly prior to bankruptcy in suits for the collection of their claims and which suits were terminated by the bankruptcy, these claims fall under Section 64–b (5) "debts owing to any person who by the laws of the states or the United States is entitled to priority." They are entitled to priority of payment in the case at bar by reason of the provision of the California law contained in the state Insolvency Act. It has been held by the Circuit Court of Appeals of this Circuit that the provisions of the state insolvency law granting priority to attachment cost claims in the event of insolvency of the debtor are not suspended by the National Bankruptcy Act. In re Amoratis (C. C. A. 9th Cir.), 24 A. B. R. 565. The said Insolvency Act grants priority to attachment costs where it appears the effect of the attachment was to keep intact the property of the debtor and the general creditors were benefited thereby.

IT IS ORDERED: That the Trustee pay the allowed labor claims and allowed attachment cost claims in advance of the payment of tax claims.

Dated, San Francisco, Cal., this 7th day of April, 1922.

A. B. KREFT,
Referee in Bankruptcy.

[Endorsed]: Filed Apr. 14, 1922, at 4 o'clock and —— Min. P. M. A. B. Kreft, Referee in Bankruptcy.

In the District Court of the United States for the Southern Division of the Northern District of California.

In the Matter of WEST COAST RUBBER COMPANY, Bankrupt.

Petition for Review of Referee's Order.

Comes now the United States of America, a solvent corporation, by counsel and files this, its petition for review of the order of the Referee entered herein April 7, 1922, and respectfully shows that it has duly filed in the above-entitled matter its claim for manufacturer's excise taxes and penalties due under section 900 of the Revenue Act of 1918 against said bankrupt, amounting to the sum of $2,158.15 taxes and $889.86 penalties, and that the same is unpaid; and your petitioner says that the Referee has erred in holding and adjudging that the allowed labor claims and allowed attachment claims filed herein are entitled to pri-

ority and payment in full as against the claim for manufacturer's excise taxes and penalties of your petitioner; and that the referee has erred in ordering and directing the trustee to pay said allowed labor claims and allowed attachment claims in advance of the payment of the said manufacturer's excise taxes and penalties claim of your petitioner.

THEREFORE your petitioner prays that said order entered herein by the Referee be reviewed by the Honorable Judge of the District Court of the United States for the Southern Division of the Northern District of California, and that said ordered be adjudged erroneous and void.

JOHN T. WILLIAMS,
United States Attorney.
JAMES RALEIGH KELLY,
Assistant United States Attorney,
Attorneys for the United States of America.

[Endorsed]: Filed May 2, 1922, at 1 o'clock and 30 Min. P. M. A. B. Kreft, Referee in Bankruptcy.

In the District Court of the United States for the Southern Division of the Northern District of California.

No. 12,338.

In the Matter of WEST COAST RUBBER COMPANY, Bankrupt.

Petition for Review of Referee's Order.

Comes now The City and County of San Francisco, a municipal corporation of the State of Cali-

fornia, by counsel, and files this its petition for review of the order of the Referee entered herein April ——, 1922, and respectfully shows that it has duly filed in the above-entitled matter its claim for taxes against said bankrupt for the year 1921, amounting to $1,007.61, and that the same is unpaid: And your petitioner says that the Referee has erred in holding and adjudging that the allowed labor claims and allowed attachment claims filed herein are entitled to priority and payment in full as against the claim for taxes of your petitioner; and that the Referee has erred in ordering and directing the Trustee to pay said allowed labor claims and allowed attachment claims in advance of the payment of said tax claims of your petitioner.

WHEREFORE, your petitioner prays that said order entered herein by the Referee be reviewed by the Honorable Judge of the District Court of the United States for the Southern Division of the Northern District of California, and that said order be adjudged erroneous and void.

GEO. W. LULL,
By E. J. MITCHELL,
Attorney for City and County of San Francisco, State of California.

[Endorsed]: Filed Apr. 24, 1922, at 3 o'clock and —— Min. P. M. A. B. Kreft, Referee in Bankruptcy.

In the District Court of the United States for the Southern Division of the Northern District of California.

In the Matter of WEST COAST RUBBER COMPANY, Bankrupt.

Referee's Certificate Upon Petitions to Review.

To the Honorable MAURICE T. DOOLING, Judge of the United States District Court for the Northern District of California.

The undersigned, Referee in Bankruptcy, to whom was referred the above-entitled matter, respectfully certifies and reports:

That on the 7th day of April, 1922, an order was made by the Referee in the above-entitled matter directing the Trustee of the estate of said bankrupt to pay the allowed labor claims and allowed attachment cost claims given priority under the provisions of Section 64–b of the Bankruptcy Act in advance of the payment of tax claims presented by the United States and by the City and County of San Francisco. The United States and the City and County of San Francisco have within time granted by the Referee filed their petitions to review said order.

The facts and a consideration of the questions of law are set out in the referee's memorandum opinion, filed herein on April 14, 1922, transmitted herewith, to which I desire to add the following:

No claim was made by the Government or the city that the assets coming into the possession of the

trustee were subject to liens upon the tax claims presented. The general rule is that taxes are not a lien unless expressly made so by statute. Heine vs. Levee Commrs., 19 Wall. 655. The Revenue Act of 1918, under which the Government's claim arises, makes no provision for liens as to the taxes in question. Section 3186, R. S. U. S., as amended, provides:

> "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States from the time when the assessment-list was received by the collector, except when otherwise provided, until paid, with the interest, penalties and costs that may accrue in addition thereto, upon all property and rights to property belonging to such person: Provided, however, That such lien shall not be valid as against any mortgages, purchaser, or judgment creditor until notice of such lien shall be filed by the collector in the office of the clerk of the district court of the district within which the property subject to such lien is situated: Provided further, Whenever any State by appropriate legislation authorizes the filing of such notice in the office of the registrar or recorded of deeds of the counties of that State, or in the State of Louisiana in the parishes thereof, then such lien shall not be valed in that State as against any mortgagee, purchaser, or judgment creditor, until such notice shall be filed in the office of the regis-

trar or recorded of deeds of the county or counties, or parish or parishes in the State of Louisiana, within which the property subject to the lien is situated."

The Government made no proof of demand or refusal to pay the taxes in question. It was not shown that notice of lien was filed in the office of the Clerk of the United States District Court, or recorded under state law. As to the city's claim the state law gives a lien upon real property of the taxpayer for personal property tax. The funds in the hands of the trustee are the proceeds from the sale of personal property only. It is, therefore, unnecessary to consider in this case the bearing of liens for taxes upon the order of priority of payment of tax claims under the Bankruptcy Act. So far as disclosed by the record, the tax claims presented occupy no better position than claims held by general creditors, except for the priority granted tax claims by Section 64–a of the Bankruptcy Act. Your Referee held that the payment of tax claims provided for in Section 64-a does not precede, but follows, the payment of debts granted priority under paragraph "b" of said section; that the words "advance of" used in paragraph "a" directing the payment of taxes "in advance of the payment of dividends to creditors" mean "next preceding," and that the word "dividends" refers to partial payments to general creditors, and that such dividends are not payable until all debts mentioned in paragraph "b" of Section 64 have been paid in full; that the words "except

as herein provided" used in paragraph "b" specifying "the debts to have priority, except as herein provided" refer to debts given superior rights by other provisions of the Act, and not to taxes, which are not classified as debts, such debts excepted from the operation of paragraph "b" are debts secured by liens given by substantive law, coming within Section 67-d of the Bankruptcy Act, and which debts under Section 67-d are "not to be affected by this Act." The Referee's reasons for the foregoing holdings and a review of the cases bearing upon the questions at issue are set out at length in the opinion above referred to, and which I desire to make a part of this certificate.

Dated, San Francisco, Cal., this 3d day of May, 1922.

Respectfully submitted,

A. B. KREFT,

Referee in Bankruptcy.

Papers transmitted herewith:

Claim of the United States.

Claim of the City and County of San Francisco.

Objections of the Trustee to said claims.

Referee's opinion and order thereon.

Petition of the United States for review.

Petition of the City and County of San Francisco for Review.

[Endorsed]: Filed at 4 o'clock and 50 Min. P. M., May 3, 1922. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 12,338.

In the Matter of WEST COAST RUBBER CORPORATION, INC., Bankrupt.

Opinion Affirming Order of Referee.

PHILIP S. EHRLICH, Esq., Attorney for Bankrupt.

R. G. HUNT, Esq., Attorney for Trustee.

GEORGE LULL, Esq., City Attorney, and A. J. HEARST, Esq., Assistant City Attorney, Attorneys for the City and County of San Francisco, California.

JOHN T. WILLIAMS, Esq., United States Attorney, and JAMES RALEIGH KELLY, Esq., Assistant United States Attorney, Attorneys for the United States.

ON PETITION TO REVIEW REFEREE'S ORDER DIRECTING PAYMENT OF LABOR AND ATTACHMENT CLAIMS.

The language of Section 64–a of the Bankruptcy Act instead of declaring that the Court shall order the trustee to pay first all taxes, etc., declares that it shall order the trustee to pay such taxes in advance of the payment of dividends to creditors.

Section 65–a declares "Dividends of an equal per centum shall be declared and paid on all al-

lowed claims except such as have priority or are secured."

The Supreme Court in the case of Richmond vs. Bird, 249 U. S. 174, says: "Scetion 64–a directs that taxes be paid in advance of dividends to creditors; and dividends as commonly used throughout the act means partial payment to general creditors."

Section 64–b gives priority to certain labor and attachment claims, and the referee by the order sought to be reviewed directed the payment of such claims in advance of the payment of certain taxes due the United States Government and the City of San Francisco.

The ordinary rules of construction support the ruling of the referee. The taxes in question are given priority only over "dividends to creditors." Everywhere else in the act the word "dividend" means a partial payment to general creditors. There is no reason why a different meaning should be assigned to it here.

The order of the referee is affirmed.

July 8th, 1922.

M. T. DOOLING,
Judge.

[Endorsed]: Filed at 1 o'clock and —— min. P. M., Jul. 8, 1922. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

Certificate of Clerk U. S. District Court to Copies of Certain Papers.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify the foregoing to be full, true, and correct copies of

Praecipe for transcript of record.

Proof of claim of U. S. Government.

Affidavit of John Ginty, Assessor, re Claim of the City and County of San Francisco with exhibit attached.

Proof of claim of City and County of San Francisco, with exhibit attached.

Trustee's written objections to claims.

Opinion and order of referee disallowing priority to certain claims.

Petition of United States for review of Referee's order.

Petition of the City and County of San Francisco for review of Referee's order.

Referee's Certificate upon petitions for review.

Opinion (Hon. M. T. Dooling, District Judge) affirming the order of Referee

in the Matter of West Rubber Corporation, a Corp., in Bankruptcy, No. 12,338, as the same now remain on file and of record in this office; said copies having been prepared in accordance with the praecipe filed herein on January 6th, 1923.

I further certify that the cost for preparing and certifying the foregoing copies is the sum of Fourteen Dollars and Fifteen Cents ($14.15), and that

the same will be charged against the United States in my next quarterly account.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 9th day of January, A. D. 1923.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk.

[Endorsed]: No. 3966. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of West Coast Rubber Corporation, Inc., a Corporation, Bankrupt. The United States of America, and The City and County of San Francisco, a Municipal Corporation, Petitioners, vs. A. J. Oliver, as Trustee, and Oscar Courtin, Dorothy E. Knight, C. S. Sanford, D. C. Tuhey, H. Black, and Hugh V. Casserly, Respondents. Transcript of Record in Support of the Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, an Order of the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed January 9, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.
By Paul P. O'Brien,
Deputy Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER OF SUBMISSION

Ordered above-entitled cause argued by Mr. James Raleigh Kelly, Special Assistant United States Attorney and counsel for the petitioner, and by Mr. Reuben G. Hunt, counsel for the respondents, and submitted to the Court for consideration and decision.

UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER FILING OPINION AND JUDGMENT

By direction of the Honorable William B. Gilbert, William H. Hunt and Frank H. Rudkin, Circuit Judges, before whom the causes were heard, ordered that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the Clerk, and that a decree or judgment be filed, and recorded in the minutes of this court in each of the causes in accordance with the opinion filed therein: * * * In the Matter of West Coast Rubber Corporation, Inc., a Corporation, Bankrupt. The United States of America and the City and County of San Francisco, a Municipal Corporation, Petitioners, vs. A. J. Oliver, as Trustee, and Oscar Courtin, Dorothy E. Knight, C. S. Sanford, D. C. Tuhey, H. Black, and Hugh V. Casserly, Respondents. No. 3966. * * *

UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

OPINION—Filed July 2, 1923

GILBERT, Circuit Judge. This case, on petition for revision, presents the question of the relative order of priority between tax claims and labor claims in the distribution of an estate in bankruptcy, the assets being insufficient to pay all such claims in full. It involves the construction of Sections 64a and 64b of the Bankruptcy Act. 64a directs the court to order the payment of "all taxes legally due and owing by the bankrupt to the United States, State, County, District or Municipality in the advance of the payment of dividends to creditors." 64b provides: "The debts to have priority except as herein provided and to be paid in full out of bankrupt's estates shall be (after payment of costs of preserving the estate, filing fees and

costs of administrations) (4) wages of workmen, etc. Wages due to workmen, clerks, traveling or city salesmen or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundrd dollars to each claimant." The Court below held that the claim for wages was prior in rank to taxes owing by the bankrupt. In support of that ruling, reference is made to the language of Section 64a in which the taxes are directed to be paid before the payment of dividends to creditors, and it is said that as "dividends to creditors" means partial payments to general creditors, and payment of taxes is directed to be paid prior to the payment of such dividends only, the intention was to give priority to all the preferred claims mentioned in 64b. It is true that the term "dividends to creditors" ordinarily refers to dividends to general creditors. But it does not necessarily have that meaning. A dividend is that which is to be divided. In bankruptcy it is the sum of money which is to be divided among two or more creditors. It is not necessarily a partial payment. It is obvious that it may at times be a payment in full even as to general creditors. We think it is the intention of 64a to provide that taxes shall be paid before any payment is made to creditors, whether they be general creditors or preferred creditors. The power to levy and collect taxes is not only an indispensable attribute of sovereignty but it is absolutely necessary to the support of Government, the maintenance of law and order and the protection of life and property. It is not to be supposed that the power to tax would be subordinated to the claim of any creditor however meritorious that claim may be. In the Bankruptcy Act of 1867, this was not left to doubt. The law made it clear that after the payment of fees, costs, and expenses, all debts due the United States and all taxes and assessments under both the laws of the United States and the states should be paid, and thereafter wages for services performed within a stated period prior to bankruptcy.

The Court below found authority for its ruling in Richmond vs. Bird, 249 U. S. 174, in which the Court said: "Section 64a directs that taxes be paid in advance of dividends to creditors; and 'dividends' as commonly used throughout the Act means partial payment to general creditors." We do not find that the Court was there dealing with the question which is involved in this case. That was a case in which the city of Richmond sought to have taxes declared payable out of the bankrupt's assets in preference to the claim of a landlord which was secured by a specific lien arising upon distraint. The Court held that the city had no such superior right since neither the laws of the United States nor those of the state accorded it such priority. In Richmond vs. Bird, no reference was made to Guarantee Company vs. Title Guaranty Co., 224 U. S. 152. In the latter case, the Court had said: "Labor claims are given priority and it is provided that debts having priority shall be paid in full. The only exception is taxes legally due and owing by the bankrupt to the United States, State, County, District or Municipality." It is objected that what was thus said was obiter but conceding

that it may have been unnecessary to the decision of the question then pending before the Court, it should nevertheless be taken as the expression of the view of the Court upon the question of the relative rank of taxes and labor claims, and we do not find that it is inconsistent with or that it is met or answered by anything that was held or said in Richmond vs. Bird In harmony with the conclusion which we reach are In re Weissman, 178 Fed. 115, and In re Kittenplan, 285 Fed. 62.

The petitioner discusses also the question whether penalties are allowable as part of the taxes, but that question is not properly before us, the Court below not having ruled upon it, and it appearing that the referee in bankruptcy on a hearing had before him later than the hearing which is herein sought to be revised, had fixed the amount of taxes and that no review has been taken of his order.

The order is reversed.

[File endorsement omitted.]

UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

JUDGMENT—Filed July 2, 1923

Petition for revision, under section 24b of the Bankruptcy Act of Congress, approved July 1, 1898, to revise, in matter of law, an order of the Southern Division of the United States District Court for the Northern District of California, First Division.

The above-entitled matter came on to be heard on the said petition for revision, and on the transcript of the record filed in support thereof, and was duly submitted to the Court for consideration and decision:

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court in this matter be, and hereby is reversed.

[File endorsement omitted.]

UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

CERTIFICATE OF CLERK

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing seventy (70) pages, numbered from and including 1 to and includ-

ing 70, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Apeals, made pursuant to request of counsel for the respondents, and certified under section 3 of rule 37 of the Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 13th day of September, A. D. 1923.

F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

(Seal of the United States Circuit Court of Appeals, Fifth Circuit.)

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

WRIT OF CERTIORARI AND RETURN—Filed Nov. 30, 1923.

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which The United States of America and The City and County of San Francisco are petitioners, and A. J. Oliver, as Trustee, and Oscar Courtin, Dorothy E. Knight, C. S. Sanford, D. C. Tuhey, H. Black and Hugh V. Casserly, are respondents, No. 3966, which suit was removed into the said Circuit Court of Appeals by virtue of a petition to revise an order of the District Court of the United States for the Northern District of California, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[File endorsement omitted.]

[Title omitted]

STIPULATION AS TO RETURN TO WRIT OF CERTIORARI

It is hereby stipulated and agreed by and between the parties to the above entitled matter that the transcript of record already on file with the Clerk of the above entitled court in connection with the petition for writ of certiorari filed in the above entitled matter shall stand as a return to the said writ of certiorari granted by the above entitled court on October 22, 1923.

Dated: November 20th, 1923.

Louis V. Crowley, Reuben G. Hunt, Attorneys for Petitioner. George Lull, E. J. Mitchell, Attorneys for City and County of San Francisco. James M. Beck, H., Solicitor General.

[File endorsement omitted.]

[Title omitted]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS TO STIPULATION AS TO RETURN TO WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE UNITED STATES.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the preceding page to be a full true and correct copy of a "Stipulation as to Return to Writ of Certiorari," filed in the above entitled cause on the 22d day of November, A. D. 1923, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 22d day of November, A. D. 1923.

F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk. (Seal of United States Circuit Court of Appeals, Ninth Circuit.)

[Title omitted]

RETURN TO WRIT OF CERTIORARI

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as Clerk of said Court, in obedience to the annexed writ of certiorari issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Cir-

cuit Court of Appeals for the Ninth Circuit, commanding them to send, without delay, to the said Supreme Court the record and proceedings in the above-entitled cause, do attach to the said Writ and send to the said Supreme Court a certified copy of a "Stipulation as to Return to Writ of Certiorari," in which said stipulation it is provided that the certified transcript of the record heretofore filed by the respondents in said cause in the said Supreme Court as a part of its petition for a Writ of Certiorari may be taken as the Return to the said Writ of Certiorari, the original of which stipulation was filed in my office on the 22d day of November, A. D. 1923.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 22d day of November, A. D. 1923.

F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.
(Seal of United States Circuit Court of Appeals, Ninth Circuit.)

[File endorsements omitted.]

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1923

A. J. OLIVER, as Trustee in Bankruptcy of the Estate of West Coast Rubber Corporation, Inc. (a corporation), and OSCAR COURTIN, DOROTHY E. KNIGHT, D. C. TUHEY, H. BLACK and HUGH V. CASSERLY,

Petitioners,

vs.

UNITED STATES OF AMERICA (a sovereign corporation), and CITY AND COUNTY OF SAN FRANCISCO (a municipal corporation),

Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable William Howard Taft, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Comes now your petitioners, A. J. Oliver, as trustee in bankruptcy of the estate of West Coast

Rubber Corporation, Inc., a corporation, and Oscar Courtin, Dorothy E. Knight, D. C. Tuhey, H. Black and Hugh V. Casserly and respectfully petition this honorable court that a writ of certiorari may be granted directing the United States Circuit Court of Appeals for the Ninth Circuit to certify to this honorable court for its review and determination the case of "United States of America (a sovereign corporation) and the City and County of San Francisco (a municipal corporation), petitioners, v. A. J. Oliver, as Trustee, and Oscar Courtin, Dorothy E. Knight, D. C. Tuhey, H. Black and Hugh V. Casserly, respondents—In the Matter of West Coast Rubber Corporation, Inc. (a corporation), Bankrupt, No. 3966", pending in that court, and in that behalf your petitioners respectfully show to this honorable court as follows:

Statement of Facts.

I.

In the bankruptcy matter of the West Coast Rubber Corporation, Inc., a corporation, pending before A. B. Kreft, Esq., a Referee in Bankruptcy of the United States District Court for the Southern Division of the Northern District of California, there were filed during the course of administration priority labor claims amounting to $1217.65, priority attachment cost claims amounting to $99.70, a claim for manufacturer's excise tax and penalties due the United States Government for $3048.01, and a claim for personal property taxes and penal-

ties due the City and County of San Francisco for $1008.61.

II.

There were not sufficient funds in the bankrupt estate wherewith to pay all expenses of administration and all of these claims in full as finally allowed, and the question arose before the referee as to the relative order of priority between labor claims, attachment cost claims, and tax claims, in the distribution of the balance of the estate after payment of expenses of administration.

III.

The labor claimants and the attachment costs claimants are the same; that is to say, shortly prior to bankruptcy certain employees of the bankrupt, your petitioners Oscar Courtin, Dorothy E. Knight, D. C. Tuhey, H. Black and Hugh V. Casserly, who did not receive their wages earned within three months of the filing of the bankruptcy petition, brought suit in the state court of California and caused an attachment to be levied upon certain property of the bankrupt and in that suit expended certain costs. As against taxes, said petitioners herein asserted before the referee the right to priority of payment of their wages by virtue of the provisions of Sec. 64-b (4) of the Bankruptcy Act, and of their attachment costs by virtue of the provisions of Sec. 64-b (5) of the Act taken in conjunction with Sec. 69 of the Insolvency Act of the State of California. In the case of in re Amoratis,

178 Fed. Rep. 919, decided by the Circuit Court of Appeals for the Ninth Circuit, it was held that, inasmuch as attachment costs are given a priority by the insolvency law of California, they should also be given priority in bankruptcy under Sec. 64-b (5) as they are debts given priority by state law.

IV.

The referee made an order on April 7, 1922, fixing the amount of the labor and attachment costs claims and holding that these should be paid in full prior to any payment on the tax claims. This order was reviewed by District Judge Dooling, who on July 8, 1922, affirmed it; and the matter was then taken to the Circuit Court of Appeals for the Ninth Circuit, which, on July 2, 1923, handed down a decision reversing the order of the lower court and holding that taxes should be paid first.

Statement of Reasons Relied on for Allowance of Writ.

I.

The sole question involved in this case is the proper construction of Sec. 64, subdivisions "a" and "b", of the Bankruptcy Act. It was contended by your petitioners before the Referee, the District Judge and the Circuit Court of Appeals, that this section establishes the following order of priority:

(a) Cost of preserving estate. Sec. 64-b (1).

(b) Filing fees. Sec. 64-b (2).

(c) Costs of administration. Sec. 64-b (3).

(d) Wages. Sec. 64-b (4).

(e) Debts entitled to priority by the laws of the United States or of the various states (such as attachment costs). Sec. 64-b (5).

(f) Taxes. Sec. 64-a.

(g) General creditors.

This contention was upheld by the Referee and District Judge, but the Circuit Court of Appeals placed taxes ahead of wages and attachment costs.

II.

The decision of the District Judge is specifically based upon the language used by the Supreme Court in the recent case of City of Richmond v. Bird (249 U. S. 174, 43 Am. B. R. 260, 39 Sup. Ct. 186), which he thought settled the question, where the court said:

> "Section 64a directs that taxes be paid in advance of dividends to creditors; and dividends as commonly used throughout the act means partial payments to general creditors".

Collier on Bankruptcy, Thirteenth Edition, takes the same view as the District Judge, for in Vol. 2, page 1441, it states:

> "The tendency of the earlier cases was to construe subsection 'a' as putting taxes in a different and really higher class than the debts

> enumerated in subsection 'b', but it is now definitely settled that tax claims have priority over claims of general creditors only and not over the claims mentioned in subsection 'b' "

and then cites City of Richmond v. Bird, supra. The Court of Appeals for the Seventh Circuit in the case of in re Utt, 5 Am. B. R. 383, 105 Fed. 754, takes the same view as the Supreme Court as to the meaning of the word "dividends".

III.

The decision of the Ninth Circuit Court of Appeals reversing the District Judge is specifically based upon the language used by the Supreme Court in the earlier case of Guarantee Title and Trust Co. v. Title Guaranty & Surety Co., 224 U. S. 152, 27 Am. B. R. 873, where the court said:

> "Labor claims are given priority and it is provided that debts having priority shall be paid in full. The only exception is taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality."

The Supreme Court evidently had in mind in making such a statement that the words "except as herein provided" at the commencement of Sec. 64-b refer to some exception contained in that section only and, therefore, necessarily in the tax portion, 64-a; but your petitioners are of the opinion that such words really mean *"except as in the act otherwise provided"* and refer to liens upon the property of the estate not affected by the act such

as vendors' liens, mechanics' liens, materialmen's liens, landlords' liens, mortgage liens, liens on special funds, pledges, warehousemen's liens, etc., which are protected by Sec. 67-d of the Act and must be recognized in the distribution of the estate; and that the Supreme Court was of the same opinion when it made the statement it did in City of Richmond v. Bird, supra. Similar language as to exceptions is to be found in Sec. 21-b and Sec. 38-4, but in both cases it is obvious that the words really mean *"except as in the act otherwise provided."*

The Court of Appeals refers, in its decision, to City of Richmond v. Bird, supra, but holds that the language of the court in that case was not necessary to the decision, and, while conceding that the language of the court in the Guarantee Title & Trust Co. v. Title Guaranty & Surety Co. case may have been unnecessary to the decision, holds that the statement of the Supreme Court in that earlier case should be taken as the expression of the view of the court upon the question of the relative rank of taxes and labor claims and that it is not inconsistent with what is said on the subject in City of Richmond v. Bird. It seems to your petitioners that the two expressions of the Supreme Court are in direct conflict and cannot be reconciled, and that the later expression in City of Richmond v. Bird controls, if either.

The Court of Appeals, also, in its decision, says:

> "The power to levy and collect taxes is not only an indispensible attribute of sovereignty

> but it is absolutely necessary to the support of the government, the maintenance of law and order and the protection of life and property. It is not to be supposed that the power to tax would be subordinated to the claim of any creditor however meritorious that claim may be".

and yet Justice McKenna, in the Guarantee Title & Trust Co. v. Title Guaranty & Surety Co. case, said:

> "The act takes into consideration, we think, the whole range of indebtedness of the bankrupt—national, state and individual—and assigns the order of payment. The policy which dictated it was beneficent and well might induce a postponement of claims, even of the sovereign, in favor of those who necessarily depended upon their daily labor. And to give such claims priority could in no case seriously affect the sovereign. To deny them priority would in all cases seriously affect the claimants."

IV.

In view of the statement of the Supreme Court in City of Richmond v. Bird, supra, when considering the meaning of the language in the tax section, 64-a, that "taxes be paid in advance of dividends to creditors", that the word "dividends" means "partial payments to general creditors", your petitioners contend that the payments required to be made by Sec. 64-b, which includes labor and attachment costs claims, must be paid in advance of taxes as the estate is not ready to pay dividends to general creditors until all such payments have been made. The words "in advance of" really mean

"next preceding". If, therefore, Sec. 64a is given this construction, it would read: "The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality, *next preceding partial payments to general creditors.*"

V.

In the case of Matter of Kittenplan, 49 Am. B. R. 410, 285 Fed. 62, the District Court for the Southern Division of New York, held in conformity with the decision of the Court of Appeals for the Ninth Circuit, but in the case of in re Essenkay Products Co., No. 3459, in the District Court for the Eastern District of Illinois, District Judge Carpenter on Jan. 8, 1923, in an unreported case held in conformity with District Judge Dooling's decision that labor claims come first. There is an expression in Matter of Anderson, 279 Fed. 525, 48 Am. B. R. 350, 353, which may be *obiter dicta,* as follows:

> "The order of payment to the United States is next after wages due workmen, clerks or servants which have been earned within three months before the date of the commencement of the proceedings. The Guarantee Title and Trust Co. v. Title Guaranty & Surety Co., 224 U. S. 152, 27 Am. B. R. 873, 32 Sup. Ct. 457, 56 Law Ed. 706."

It is to be noted that the Circuit Court of Appeals for the Second Circuit takes a different view of Guarantee Title & Trust Co. v. Title Guaranty & Surety Co., than the Court of Appeals for the Ninth Circuit in the case at bar.

VI.

There is another and more serious conflict among the decisions as to whether, in view of the fact that the tax section, 64-a, precedes 64-b providing for the priority of costs of administration, labor claims, etc., taxes should not be placed ahead of everything and be paid in advance of costs of administration. A number of the early cases held that taxes must be paid first even in advance of expenses of administration. See

In re Weiss (D. C. N. Y.), 20 Am. B. R. 247, 159 Fed. 295;

In re Prince & Walter (D. C. Pa.), 12 Am. B. R. 675, 131 Fed. 546;

In re Cramond (D. C. N. Y.), 17 Am. B. R. 22, 145 Fed. 966;

In re Weissman (D. C. Conn.), 24 Am. B. R. 150, 178 Fed. 115.

Later cases have repudiated this doctrine and held that expenses of administration must be paid before taxes. See

State of New Jersey v. Lovell (C. C. A. 3rd Cir.), 24 Am. B. R. 562, 179 Fed. 321;

Matter of Jacobson (C. C. A. 7th Cir), 45 Am. B. R. 1, 263 Fed. 883;

Polk County, Iowa v. Burnes (C. C. A. 8th Cir.), 40 Am. B. R. 727, 247 Fed. 399;

In re Oxley (D. C. Wash.), 30 Am. B. R. 406, 204 Fed 826;

In re Hessler Foundry & Mfg. Co., 45 Am. B. R. 382.

VII.

The question as to the proper place for taxes in the distribution of bankrupt estates has become important throughout the United States owing to the many cases in which large claims for back income taxes have been filed by the United States Government and in which labor claims have also been filed. Trustees and referees have been in doubt, owing to the conflict in decisions above noted, as to which should be paid first. Your petitioners have been informed through the office of the Attorney-General of the United States that there are now pending in the various Federal Courts throughout the United States seven cases in which the precise question is the same as the one in the case at bar.

Your petitioners believe that, in view of the conflict in the decisions, and the divergent opinions respecting the meaning of the language of the Supreme Court used in City of Richmond v. Bird, supra, and Guarantee Title & Trust Co. v. Title Guaranty & Surety Co., supra, it is essential to a uniform contruction throughout the United States of Sec. 64, subdivisions "a" and "b", of the Bankruptcy Act, that an authoritative ruling be made by the Supreme Court in the case at bar.

Wherefore, your petitioners pray that a writ of certiorari be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding

said court to certify and send to this court on a day certain to be designated a full and complete transcript of the record and all proceedings of said court of appeals in this case, being Cause No. 3966 in said court, to the end that said cause may be reviewed by this court as provided by law; and that your petitioners may have such other relief or remedy in the premises as to this court may seem appropriate; and that the judgment of said United States Court of Appeals for the Ninth Circuit so complained of herein may be reversed by this honorable court.

Dated, San Francisco,
September 15, 1923.

A. J. OLIVER, *as Trustee in Bankruptcy of the Estate of West Coast Rubber Corporation, Inc., (a corporation)*,
OSCAR COURTIN,
DOROTHY E. KNIGHT,
D. C. TUHEY,
H. BLACK,
HUGH V. CASSERLY.
Petitioners.

REUBEN G. HUNT,
Attorney for Petitioners.

LOUIS V. CROWLEY,
Of Counsel.

State of California,
City and County of San Francisco,—ss.

A. J. OLIVER, being first duly sworn, deposes and says:

I am one of the petitioners named in the foregoing petition, and make this verification also on behalf of the other petitioners. I have read the said petition and know the contents thereof and the same is true of my own knowledge, except as to the matters therein stated on information or belief and as to those matters I believe it to be true.

A. J. OLIVER,

Subscribed and sworn to before me this 15th day of September, 1923.

(Seal) J. D. Brown,
Notary public in and for the City and County of San Francisco, State of California.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for petitioners in the above entitled cause and that in my judgment the foregoing petition for writ of certiorari is well founded in point of law as well as in fact and that said petition for writ of certiorari is not interposed for delay.

Dated, San Francisco,
September 15, 1923.

LOUIS V. CROWLEY,
Of Counsel for Petitioners.

Supreme Court, U.S.
FILED
MAY 27 1924
WM. R. STANSBURY
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1923

No. [redacted]180

A. J. OLIVER, as Trustee in Bankruptcy of the Estate of West Coast Holding Corporation, Owen Gowen, Dewey E. Kinney, et al.,

Petitioners,

vs.

THE UNION BANK OF ARIZONA, and THE CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation,

Respondents.

Petition to the Supreme Court for a Writ of Error to the [redacted]

BRIEF FOR PETITIONERS.

[redacted]

Benjamin G. Hook,
Attorney for Petitioners.

Parker Printing Company, San Francisco, Cal. Telephone

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No. 574

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1923

A. J. OLIVER, as Trustee in Bankruptcy of the Estate of West Coast Rubber Corporation, OSCAR COURTIN, DOROTHY E. KNIGHT, et al.,
Petitioners,

vs.

THE UNITED STATES OF AMERICA, and THE CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation,
Respondents.

Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONERS.

I.

STATEMENT OF THE CASE.

This matter comes before the Supreme Court upon certiorari to the Circuit Court of Appeals for the Ninth Circuit.

The bankrupt estate of the West Coast Rubber Corporation was administered before A. B. Kreft,

Esq., referee in bankruptcy at San Francisco. Certain labor claims were filed against the estate and the referee allowed them for the total sum of $917.85 as entitled to priority of payment under the provisions of Sec. 64b (4) of the bankruptcy act. These claimants also presented claims for costs incurred in attachment suits commenced prior to bankruptcy in an endeavor to collect their claims. These attachment costs claims were allowed for the total sum of $99.70 as entitled to priority of payment under the provisions of Sec. 64b (5) of the bankruptcy act, as the same was construed by the Circuit Court of Appeals for the Ninth Circuit in the case of *In re Amoratis,* 178 Fed. Rep. 919.

The United States Government presented a claim for manufacturer's excise tax which was finally allowed by the referee for $1851.66. The City and County of San Francisco, a municipal corporation, presented a claim for personal property taxes, which was finally allowed for $904.26.

It appeared that there was not enough money in the estate to pay all of these claims in full, although there was sufficient to pay either the tax claims in full or the labor and attachment costs claims in full. The question then arose as to what claims should be paid first.

The referee decided that labor and attachment costs claims should be paid first. This decision was affirmed by District Judge Dooling of the Northern

District of California, but was reversed by the Circuit Court of Appeals for the Ninth Circuit, which held that the tax claims should be paid before the labor and attachment costs claims. The referee, in his order, set out in detail his views upon the legal questions involved (Trans. of Record, pp. 34-50). On review of the referee's decision he filed his certificate, wherein he discussed further the legal matters involved (Trans. of Record, pp. 53-56). Judge Dooling, in connection with his decision, wrote a short opinion (Trans. of Record, p. 57). The opinion of the Circuit Court of Appeals appears in Trans. of Record, pp. 61-63.

II.

STATUTES INVOLVED.

The case at bar involves the construction of Secs. 64a and 64b (4) and 64b (5) of the Bankruptcy Act.

III.

QUESTION PRESENTED.

The sole question presented is whether the tax claims referred to in Sec. 64a of the Bankruptcy Act are to be paid prior to the labor claims referred to in Sec. 64b (4) of the act, and attachment costs claims in California covered by Sec. 64b (5) of the act as construed in the case of *In re Amoratis,* 178 Fed. Rep. 919, by the Court of Appeals for the Ninth Circuit.

ARGUMENT.

IV.

1. A REASONABLE CONSTRUCTION OF SECTION 64, SUBDIVISIONS "A" AND "B" OF BANKRUPTCY ACT, ESTABLISHES THE FOLLOWING ORDER OF PRIORITY IN THE DISTRIBUTION OF THE ESTATE:

(1) Expenses of preserving estate. Sec. 64b (1).
(2) Filing fees. Sec. 64b (2).
(3) Expenses of administration. Sec. 64b (3).
(4) Wages. Sec. 64b (4).
(5) Debts entitled to priority by the laws of the United States or of the various states, such as attachment costs. Sec. 64b (5).
(6) Taxes. Sec. 64a.
(7) General creditors.

We think the disposition of the case at bar turns upon the meaning of the words *"dividends to creditors"* used in Sec. 64a.

In the concluding paragraph of his opinion (Trans. of Record, p. 58), Judge Dooling, after referring to the case of

City of Richmond v. Bird (1919), 43 Am. B. R. 260, 249 U. S. 174, 39 Sup. Ct. 186,

wherein the Supreme Court stated that the word *"dividends"* as commonly used throughout the act, means partial payment to general creditors, states:

> "The ordinary rules of construction support the ruling of the referee. The taxes in question are given priority only over 'dividends to creditors.' Everywhere else in the act the word 'dividend' means a partial payment to general creditors. *There is no reason why a different meaning should be assigned to it here."* (Italics ours.)

In their opinion, the Circuit Court of Appeals say (Trans. of Record, p. 62):

> "It is true that the term 'dividend to creditors' ordinarily refers to dividends to general creditors, but it does not necessarily have that meaning. A dividend is that which is to be divided. In bankruptcy it is the sum of money which is to be divided among two or more creditors. It is not necessarily a partial payment. It is obvious that it may at times be a payment in full even as to general creditors."

What provisions are contained in the act that support these respective views?

Sec. 1a (9), which defines the term "creditor," is as follows:

> "Creditor shall include anyone who owns a demand or claim provable in bankruptcy * * ."

Sec. 1a (11):

> "Debt shall include any debt, demand or claim provable in bankruptcy."

Sec. 39a (1):

> "Referees shall declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable."

Sec. 47a (9):

> "Trustees shall * * * pay dividends within ten days after they are declared by the referees."

Sec. 53a:

> "The Attorney-General shall annually lay before Congress statistical tables showing for the

whole country, and by states, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property of the estates; the dividends paid and the expenses of administering such estates; and such other like information as he may deem important."

Sec. 56a:

"Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided."

Sec. 56b:

"Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess."

Sec. 57e:

"Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities."

Sec. 57h:

"The value of securities held by secured creditors shall be determined by converting the same

into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance."

Sec. 57-1:

"Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole or the proportional part thereof is rejected only in part."

Sec. 58a (5):

"Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the cases by the creditors, unless they waive notice in writing, of * * * the declaration and time of payment of dividends * * * ."

Sec. 65a:

"Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured."

Sec. 65c:

"The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends;

but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends."

Sec. 65d:

"Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such court shall be paid any amounts."

While it is to be noted that in the sections we have quoted the word "dividend" is not defined, still the language contained in Sec. 65a,

"Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured,"

is equivalent to a definition to the effect that "dividend" means partial payments to general creditors. We find that nowhere in the act is the word "dividend" referred to in any manner other than as partial payment to general creditors.

We cannot find anything in the act that indicates that payments on claims which are to be paid in full are to be treated as dividends to creditors within the meaning of Sec. 64a. Lending strength to the distinction between dividends to be paid to general creditors and payments to creditors who are to be

paid in full are the provisions of Secs. 56a, 56b and 57 to the effect that creditors who are to be paid in full or are secured have no voice in voting upon matters concerning the administration of the estate.

In *City of Richmond v. Bird,* supra, the Supreme Court notes particularly Sections 65b and 64a. The court, at page 262 of 43 Am. B. R. states:

> "Sec. 64a directs that taxes be paid in advance of dividends to creditors; and 'dividend' as commonly used throughout the act means partial payment to general creditors. In Sec. 65b (Comp. St., Sec. 9649), for example, the word occurs in contrast to payment of debts which have priority."

Before the bankrupt estate is ready to pay dividends to general creditors, its property must be sold and all payments required by Sec. 64 completed. If Congress intended that taxes should precede the payments required by Sec. 64b, or some of them, why were the words "in advance of dividends to creditors" used? There is apparently no purpose in their use except to indicate that taxes are to be paid just prior to payments to general creditors, because the words "in advance of" really mean "next preceding", so that, if we give Sec. 64a this construction, it would read, in the light of the expression of the Supreme Court in *City of Richmond v. Bird,* supra:

> "The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality *next preceding partial payments to general creditors.*"

The Circuit of Appeals in its decision, while referring to the language of the Supreme Court in *City of Richmond v. Bird,* supra, relies upon the following language in the prior Supreme Court case of *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.* (1912), 224 U. S. 152, 27 Am. B. R. 873, 32 Sup. Ct. 457, 56 L. ed. 706, wherein the court, at page 879 of 27 Am. B. R., said:

> "Labor claims are given priority and it is provided that debts having priority shall be paid in full. The only exception is 'taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality'. "

It seems to us that the Supreme Court in *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.,* supra, in saying that the only exception is taxes, had in mind the words of subdivision (b) of Sec. 64: "the debts to have priority *except as herein provided.*" Sec. 64 contains no exception unless it be taxes. We think that the Supreme Court, not having before it the matter of an exact construction of the words "in advance of dividends to creditors," thought that the words "except as herein provided" referred to the taxes specified in subdivision (a). If the words "except as herein provided" in fact refer to taxes, the whole provision becomes ambiguous, because, if reference is to taxes, there would be no necessity of placing in subdivision (a) the words "in advance of payment of dividends to creditors." If such exception is not contained in Sec. 64, but

reference is made to other provisions of the act, the whole Sec. 64 becomes harmonious.

It is conceded in the case at bar that costs of preserving the estate, and expenses of administration, take precedence over taxes. If the words of subdivision "b," "except as herein provided" refer to the taxes specified in subdivision "a," where are taxes to be placed in subdivision "b"? This must, of course, be somewhere after subdivision (3), as the priority of (1), (2) and (3) are conceded. The wages in question in the case at bar are covered by subdivision (4). Therefore, if the decision of the Circuit Court of Appeals is correct, the place for taxes is between (3) and (4). If taxes are superior to (4) then they are also prior to (5) which embraces a debt due the government.

Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.

The Supreme Court, in that case, directly decided that labor claims are prior to a debt due the United States. If it was the intention of Congress to place taxes between (3) and (4) it would be hard to conceive of a more awkward way of expressing such intention. If such was the intention, the obvious and natural way would have been to insert the tax provision at (4) instead of wages. In *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, supra, the Supreme Court further states:

> "The act takes into consideration, we think, the whole range of indebtedness of the bankrupt

national, state and individual, and assigns the order of payment."

What is this range of indebtedness and what is the order of payment? We would say:

First. Liens not affected by the act as covered by Sec. 67d. The Supreme Court, in *City of Richmond v. Bird,* supra, decides that taxes (where no lien is given by law therefor) are inferior to liens protected by Sec. 67d, which are superior to everything.

Second. The payments provided for, in the order fixed, in subdivisions (1), (2), (3), (4) and (5) of Sec. 64b.

Third. Taxes.

Fourth. General creditors.

The language of the Court of Appeals for the Third Circuit, in

New Jersey v. Lovell (1910), 24 Am. B. R. 562, 179 Fed. 321,

is enlightening:

"Now, while the relative order in which subdivisions 'a' and 'b' are placed is not happy, and indeed tends to mislead, yet the general intent of the section is clear. In subdivision 'b' we find the general scheme of awarding priority in advance of dividend creditors. That subdivision makes provision for paying such costs, fees and liens as are therein provided, and if there are no outstanding taxes the fund is then paid to creditors. But before paying creditors, subdivision 'a' intervenes and makes provision

> for what, if omitted, has often proved a hardship, if not indeed an abuse in the settlement of decedent and insolvent estates, viz., delay in payment of taxes."

Later, in that decision, the court states that the question in the case at bar here was not decided, but the reasoning of the court certainly supports our position.

The point we desire to make plain here is that the words: "except as herein provided" do not refer to paragraph "a" relating to taxes, but to exceptions elsewhere found in the act, and especially embracing that very important class of debts not affected by the act and covered by Sec. 67d. viz., claims resting upon valid substantive liens. These words really mean *"except as in this act otherwise provided"*. Language is used elsewhere in the act similar to the words "except as herein provided," yet in none of these instances is an exception contained in the section in which the words appear, and in each case the apparent meaning of the words is "except as in this act otherwise provided. See Secs. 21 (b), 38 (4), and 56a.

We respectfully submit that the expression of the Supreme Court, in *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, supra, that the only exception is taxes is based upon the inadvertent assumption that the words "except as herein provided" refer to taxes, and was *obiter dicta*, and that the later expression of the court in *City of Richmond v.*

Bird, supra, (also stated by the Court of Appeals to be *obiter dicta*), is the correct construction of the act as to when taxes are payable.

There is nothing in the scheme of payment provided for by Sec. 64 which warrants the assumption that it was the intention of Congress to insert taxes between (3) and (4) of subdivision "b." If any doubt exists as to the order of payment that doubt is whether taxes precedes everything mentioned in "b" or follows everything therein.

There have been only a few decisions affecting the question at issue. *In the Matter of Enterprise Brass Foundry* (1923), 293 Fed. Rep. 69, Judge Neterer of the District Court for the Western District of Washington took Judge Dooling's view that wages should be paid ahead of taxes. *In the Matter of Kittenplan* (1922), 49 Am. B. R. 410, 285 Fed. 62, Judge Knox of the District Court for the Southern District of New York held that taxes were prior to labor claims. He referred to only a few of the cases bearing upon the question and relied on *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.,* supra, and did not mention *City of Richmond v. Bird,* supra. *In the Matter of A. J. Waterman Mfg. Co.* (1923), 291 Fed. 589, Judge Hale for the District Court of the Southern District of Maine, held, although by way of dicta, that taxes were first. He did not discuss any of the cases bearing upon the question. *In the Matter of A. E. Fountain* (1924), 2 Am. B. R., N. S., 455, Judge Augustus N. Hand

of the District Court for the Southern District of New York held that taxes are to be paid prior to labor claims. He rests his decision upon the holding of the Circuit Court of Appeals in the case at bar, and accepts their interpretation of the effect of *City of Richmond v. Bird,* supra, and *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.,* supra.

Several early cases held that, inasmuch as "a" precedes "b", and taxes were not to be considered as debts, taxes were to be paid even in advance of expenses of administration. See

In re Prince and Walter (D. C. Pa. 1904), 12 Am. B. R. 675, 131 Fed. Rep. 546;

In re Weiss (D. C. New York, 1908), 20 Am. B. R. 247, 159 Fed. Rep. 295;

In re Cramond (D. C. N. Y. 1906), 17 Am. B. R. 22, 145 Fed. Rep. 966.

The case of *City of Chattanooga v. Hill* (C. C. A. 8th Cir. 1905), 15 Am. B. R. 195, 139 Fed. Rep. 600, is sometimes referred to as supporting this doctrine, but an examination of the case shows that the court expressly refrained from passing upon the question.

The later cases have all repudiated this doctrine. See

In re Halsey (D. C. N. J., 1909), 23 Am. B. R. 401, 163 Fed. Rep. 118;

State of New Jersey v. Lovell (C. C. A. 3rd Cir., 1910), 24 Am. B. R. 562, 179 Fed. Rep. 321;

In re Oxley (D. C. Wash. 1913), 30 Am. B. R. 406, 204 Fed. Rep. 826;

Polk County v. Burnes (C. C. A. 8th Cir. 1917), 40 Am. B. R. 727, 247 Fed. Rep. 399;

Matter of Jacobson (C. C. A. 7th Cir. 1920), 45 Am. B. R. 1, 263 Fed. Rep. 883;

In re General Film Corporation (C. C. A. 2nd Cir. 1921), 48 Am. B. R. 149, 274 Fed. Rep. 903;

In re Hessler Foundry & Mfg. Co. (Ref. N. D. N. Y., 1920), 45 Am. B. R. 382;

In re Wyley Co. (D. C. N. D. Ga., 1923), 292 Fed. Rep. 900;

In re Baltimore Pearl Hominy Co. (D. C. Md., 1923), 294 Fed. 921;

In re A. J. Waterman Mfg. Co. (D. C. Me. S. D., 1923), 291 Fed. 589;

In re A. E. Fountain (D. C. N. Y. S. D., 1924), 2 Am. B. R. N. S. 455.

As was said in *Matter of Jacobsen,* supra, it is hardly conceivable that Congress would confer upon the bankruptcy court the power to sequester and preserve property and administer bankrupt estates and yet deny to the court the power to protect its officers in the performance of their duties, notwithstanding such performance of duties and such administration of the insolvent estate is for the benefit of the taxing powers even more than it is for the general creditors, by reason of the priority given taxes over the claim of general creditors.

2. SEC. 3466, REVISED STATUTES, HAS NO APPLICATION.

This section is continually referred to and relied upon by the United States Government in its claims for taxes filed against bankrupt estates, but it has no application as it has been superseded by the Bankruptcy Act. This section would apparently give priority to tax claims over labor claims, and provides:

> "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall first be satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

The following cases hold that the section does not apply to bankruptcy proceedings:

Guaranty Title & Trust Co. v. Title Guaranty & Surety Co., supra;
In re Fountain, supra;
In re A. J. Waterman Mfg. Co., supra.

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3. THE QUESTION OF PRIORITY BETWEEN SOVEREIGN AND SUBJECT IS NOT INVOLVED.

The soverign has enacted its own bankruptcy laws and instituted its own bankruptcy courts. The Con-

stitution of the United States gives Congress concurrent powers to impose and collect taxes and to establish a uniform bankruptcy law, and if Congress, in exercising these powers, establishes certain priorities of payment, and relegates taxes to an inferior position, no one can be heard to complain because Congress is only doing what the soverign gave it the right to do.

In the Bankruptcy Act of 1898, Congress departed very considerably from the principles of public policy theretofore prevailing as to the rights of the sovereign. The sovereign is expressly referred to in Sec. 64a of the act and this section is binding upon the various governments because they are named therein.

Guarantee Title & Trust Co. v. Title Guaranty & Surety Co., supra;
In re Hessler Foundry & Mfg. Co., supra.
In re General Film Corporation, supra;
In re Wyley Co., supra.

In the case of *in re Wyley Co.,* supra, Judge Sibley for the District Court for the Northern District of Georgia, said at page 901 of 292 Fed. Rep.:

> "Taxes due the United States and bankruptcies are alike wholly subject to the power of Congress. Congress may make such provision for the one through the other as it sees fit. A tax has such lien and priority, and only such, as is given it by statute. 37 Cyc. 1138, 1143. The common-law preference of the sovereign is said not to exist in favor of the United States,

save as continued by statutes. United States v. Bank of North Carolina, 6 Pet. 29, 8 Law. Ed. 308."

See also

In re Baltimore Pearl Hominy Co., 294 Fed. 921, 924.

In the case of *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, supra, Justice McKenna said on behalf of the Supreme Court (p. 879 of 27 Am. B. R.):

> "The act takes into consideration, we think, the whole range of indebtedness of the bankrupt—national, state, and individual—and assigns the order of payment. *The policy which dictated it was beneficent and might well induce a postponement of the claims, even of the sovereign, in favor of those who necessarily depended upon their daily labor. And to give such claims priority could in no case seriously affect the sovereign. To deny them priority would in all cases seriously affect the claimants.*" (Italics ours.)

In that case the Supreme Court finds that the Bankruptcy Act of 1898 departs very considerably from the Bankruptcy Act of 1867, and expresses a new intent. Debts owing to the government are to be subordinated to labor claims. If such intent appears, we see no distinction between obligations due the government for a debt or for a tax.

In that case, the question at issue was whether a debt due the United States had priority over a labor

claim. The government contended that its claim superseded other claims as it was the claim of the sovereign, while the labor claimant asserted that his claim was covered by Sec. 64b (4), that of the government by Sec. 64b (5), and his section was prior. The court held with the labor claimant. It is difficult to see how there is any difference between taxes due the United States and a debt due the same. Both are obligations of the citizen, and, when paid, go to the support of the government. It is true that taxes are not dischargeable, while debts due the United States are, yet the situation is not altered because Congress has full power, under the rights conferred upon it by the Constitution relating to bankruptcies, to discharge one kind of obligation and decline to discharge another. See *in re Wyley Co.,* supra.

We believe that undue emphasis is attached to a tax claim as such. The government has not seen fit to even create a lien in favor of the tax involved in the case at bar, and, except for the provisions of the Bankruptcy Act, the claim of the government would be in the position of an ordinary creditor unless priority be given for taxes as a debt under Sec. 3466 R. S., supra, and if so given priority, would under the decision of *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.,* supra, be subordinated to labor claims.

If Congress had intended that tax claims should be paid before labor or attachment costs claims, it could have said so in so many words. The right to establish a uniform bankruptcy law throughout the United States having been conferred upon Congress by the Constitution, Congress has the power to treat tax claims in any manner that it may see fit so far as the distribution of the bankrupt estate is concerned, even to the extent of giving taxes priority over everything else or postponing them to everything else. The taxing powers have the right to make taxes a lien upon the property of the subject, but unless the taxing power by law creates such a lien which has attached to the property of the insolvent before he goes into bankruptcy, tax claims stand in no better position than claims of general creditors, except for such priorities as are established by the Bankrupt Act itself.

In the case at bar, it is conceded that no such lien exists and that the taxes have no priority except such as is given by Sec. 64a.

V.

CONCLUSION.

We submit that, in view of the foregoing considerations, Congress clearly intended and the Bankruptcy Act clearly provides that tax claims precede in order of payment only dividends to general credi-

tors and are inferior to labor claims and attachment costs claims, and the judgment of the Circuit Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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LOUIS V. CROWLEY,
OF COUNSEL.

Dated: May 1, 1924.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

A. J. OLIVER, AS TRUSTEE IN BANKRUPTCY of the Estate of West Coast Rubber Corporation, Inc. (a corporation), and Oscar Courtin, Dorothy E. Knight, D. C. Tuhey, H. Black, and Hugh V. Casserly, petitioners,

v.

UNITED STATES OF AMERICA (A SOVEREIGN CORPORATION) and City and County of San Francisco (a municipal corporation), respondents.

} No. 574.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF ON BEHALF OF THE UNITED STATES IN OPPOSITION.

STATEMENT OF THE CASE.

In the bankruptcy matter of the West Coast Rubber Corporation, Inc., pending before A. B. Kreft, Esq., a Referee in Bankruptcy of the United States District Court for the Southern Division of the Northern

District of California, there were filed during the course of administration claims for manufacturers' excise tax and penalties due the United States Government, a claim for personal property taxes and penalties due the City and County of San Francisco, and a claim for labor wages.

Available assets were insufficient to pay all of the above claims in full, and the question arose as to which had priority. The construction of Sections 64 (a) and 64 (b) of the Federal Bankruptcy Act is the factor upon which the determination of the issue hinges. The former section directs the court to order the payment of—

> all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality in advance of the payment of dividends to creditors.

while the latter section provides—

> The debts to have priority, except as herein provided, and to be paid in full out of the bankrupt's estate * * * shall be [after payment of costs of preserving the estate, filing fees and costs of administration]; (4) wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months, etc.

The Referee handed down an order on April 7, 1922, which gave labor claims priority. This ruling received affirmation by the District Judge on July 8, 1922, but was reversed by the Circuit Court fo Appeals for the Ninth Circuit on July 2, 1923, the latter court holding that taxes should be paid first.

Petitioners' Claim.

Petitioners rest their prayer for certiorari from this court upon the following grounds:

That the phrase "dividends to creditors," as used in Section 64–a, means partial payment to general creditors, and as payment of taxes is directed to be paid prior to the payment of such dividends only, the intention was to give priority to all preferred claims mentioned in 64–b.

That the words "except as herein provided," as used in 64–b, really mean "except as in the act otherwise provided," and refer to liens not affected by the Act and which are protected by Section 67–d of the Act and must be recognized in distribution of the estate.

ARGUMENT.

Though the term "dividends to creditors" ordinarily refers to dividends to general creditors, it does not necessarily have such a meaning. A dividend in bankruptcy is a sum of money to be shared among two or more creditors. It is not necessarily a partial payment, as suggested by petitioner, but may in some instances be a payment in full, even to general creditors.

That phrase "except as herein provided" refers unmistakably to taxes described in Section 64–a. The intention on the part of Congress to except "taxes" from the priority scale set forth in 64–b is apparent. If it intended otherwise, why were the two subjects segregated and given two separate sub-

divisions in the section in question? The construction of the above term suggested by petitioners clearly defeats the intention of the legislature.

This court has expressed itself relative to the proper construction of the section of the Bankruptcy Act under consideration in the case of *Guaranty Title & Trust Co.* v. *Title Guaranty & Surety Co.* (224 U. S. 152), wherein the following appears:

> Labor claims are given priority and it is provided that debts having priority shall be paid in full. *The only exception is taxes* legally due and owing by the bankrupt to the United States, state, county, district, or municipality. (Italics ours.)

The decision of the Circuit Court of Appeals for the Ninth Circuit, which is made the basis of the petitioners' contentions herein set forth, is strictly in line with those of other Federal Courts which have had occasion to pass upon the questions involved, as is indicated by the following citations:

In re Jacobson (263 Fed. 883), C. C. A. 7.

Polk County, Ia., v. *Burns et al.* (247 Fed. 399), C. C. A. 8.

Stanard v. *Dayton* (220 Fed. 441), C. C. A. 8.

State of N. J. v. *Lovell* (179 Fed. 321), C. C. A. 3.

City of Chattanooga v. *Hill* (139 Fed. 600), C. C. A. 6.

City of Waco v. *Bryan* (127 Fed. 79), C. C. A. 5.

Swarts v. *Hammer* (120 Fed. 256), C. C. A. 8.

In re Cramond (145 Fed. 966), N. Y.

In re Weissman (178 Fed. 115), Conn.
In re Weiss (159 Fed. 295), S. D. N. Y.
In re Flynn (134 Fed. 145), Mass.
In re Brinker (128 Fed. 634), W. D. N. Y.
In re Prince & Walter (131 Fed. 550), M. D. Pa.
In re Simms (118 Fed. 356), W. D. Ga.
In re Conhaim (100 Fed. 268), Wash.

The power to issue certiorari is exercised sparingly by this court, and only in cases where the circumstances show that questions of importance are involved or a diversity of decisions of lower courts is presented. (*Forsyth* v. *Hammond*, 166 U. S. 506). Admitting that this case is of importance to petitioners, it presents no question of gravity or general public importance upon which a conflict of judicial opinion exists. On the contrary, the decision of the Ninth Circuit to which petitioners take exception is in harmony with the principles established in every circuit that has so far considered the question. This includes all but two circuits of the United States.

JAMES M. BECK, *Solicitor General.*
MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

OCTOBER, 1923.

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In the Supreme Court of the United States

OCTOBER TERM, 1924

A. J. OLIVER, AS TRUSTEE IN BANKRUPTCY of the Estate of West Coast Rubber Corporation; Oscar Courtin, Dorothy E. Knight, et al., petitioners,
v.
THE UNITED STATES OF AMERICA AND CITY and County of San Francisco

No. 180

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

STATEMENT OF THE CASE

On January 22, 1922, the West Coast Rubber Corporation was adjudicated a bankrupt. Subsequently a trustee in bankruptcy was chosen. The United States filed with the trustee in bankruptcy its claim for taxes due by the bankrupt. Similar claims were filed by the City and County of San Francisco. Claims were also filed by the individual petitioners herein for wages due them by the bankrupt. The estate was inadequate for the payment in full of the claims of the United States, the City and County of San Francisco, and these labor

claimants. In that situation, the referee in bankruptcy held that the labor claimants were entitled to payment of their claims in full before payment of the tax claims of the United States and of the City and County of San Francisco. The opinion of the referee in bankruptcy appears on pages 35–50, inclusive, of the transcript record.

Upon a petition for review of the referee's order presented to the District Court of the United States for the Southern Division of the Northern District of California that court affirmed the order of the referee. The opinion of the District Court appears at page 57 of the transcript of record.

The Circuit Court of Appeals for the Ninth Circuit, upon a petition to revise the order of the referee as affirmed by the District Court, reversed that order and held that the tax claims were entitled to priority over the claims for wages.

The statute involved is section 64 of the Bankruptcy Act of 1898 (30 Stat. at L., 563), which reads as follows:

> Sec. 64. *Debts which have priority.*—*a.* The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

b. The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority.

The sole question is whether under this section taxes or wages have priority.

I

ARGUMENT

Section 64 gives taxes priority over wages

First of all, of course, the intention of Congress is to be sought from the words employed in section

64. The section was given the heading, *"Debts which have priority."* Normally the function of a section heading is to indicate the subject matter of the section. The heading employed here, therefore, indicates that the section is to deal with such debts as shall have priority in order of payment out of the estate of the bankrupt. Following the heading the section is subdivided into two parts (*a* and *b*). Normally such a subdivision indicates that the subject matter of the section as a whole—here, *Debts which have priority*—is to be dealt with under two general divisions of " debts," classified according to some principle, and normally, also, that as in each class the kinds of debts are stated in their order of priority, so the general classes of debts are stated in their order of priority, and class *a* would have priority over class *b* debts. In short, *the framework employed here by Congress in building Section 64 indicates that " taxes " are treated therein as debts entitled to priority over " wages."*

But not only the framework of Section 64 indicates the intention of Congress as to the priority of taxes. *The positive injunction of subdivision a of section 64 is that the " taxes " therein mentioned shall be paid " in advance of dividends to creditors."* The natural meaning of this language is that before anything at all is to be paid out of the estate to " creditors " (and of course the labor claimants in the present case are " creditors ")

the "taxes" due to the Government and the municipal corporations mentioned in the statute are to be paid. The word "dividends," as employed here, has its usual and ordinary meaning. It is not one of those words which by section 1 of the Bankruptcy Act of July 1, 1898 (30 Stat. L. 544) are given a restricted meaning, and the usual and ordinary meaning of the word "dividends" includes any payment whatever made in the distribution of the subject matter of the estate or property to be divided. Thus, the word is defined in the Standard Dictionary as—

> A sum of money, resulting from division, to be distributed according to some fixed scheme; as a *dividend* of assets *pro rata* among creditors.

So in *In re Barber*, 97 Fed. 547, 550, it was said:

> A dividend in bankruptcy is a parcel of the fund arising from the assets of the estate, rightfully alloted to a creditor entitled to share in the fund, whether in the same proportion with other creditors, or in a different proportion. I think I have indicated the general understanding of the meaning of the word "dividend," and I fail to discover anything in the act tending to show that it is used in any different sense. Section 64, relating to debts which have priority, strengthens my conclusion. That provides that the trustee shall pay all taxes "in advance of the payment of dividends to creditors." This would exclude taxes from the category of dividends, but nothing else.

To the same effect with the case just cited is the language of Woods, Circuit Judge, in his dissenting opinion in *Bird et al.* v. *City of Richmond,* 240 Fed. 545, 560:

> To restrict the meaning of "dividend" to payments made to unsecured creditors would not only distort the Act, but would mean that the Act had made no provision whatever for distribution of assets in the hands of the court belonging to secured creditors of the same class or different classes. The word "dividend" is not one of the words limited in its meaning by a definition contained in the Act itself, and hence it has its usual well-known meaning, per centum of payments made in the distribution of funds in the hands of the court to all creditors whose claims are before it. It is true it is more frequently used in the Act in connection with the distribution to unsecured creditors; but that is not controlling, for the same word or phrase has a different meaning in the same statute according to its association. *American S. Co.* v. *Commissioners,* 224 U. S. 491.

We quote this language because of what seems to us to be the very sound reasoning therein, although it is contrary to the dictum of the majority of the court in the same case.

Finally, in the present case, the Circuit Court of Appeal of the Ninth Circuit, as to the meaning of the term " dividend " in section 64a, said (see page 62, transcript of record):

> It is true that the term " dividends to creditors " ordinarily refers to dividends to

> general creditors. But it does not necessarily have that meaning. A dividend is that which is to be divided. In bankruptcy it is the sum of money which is to be divided among two or more creditors. It is not necessarily a partial payment. It is obvious that it may at times be a payment in full even as to general creditors. We think it is the intention of 64a to provide that taxes shall be paid before any payment is made to creditors, whether they be general creditors or preferred creditors. The power to levy and collect taxes is not only an indispensable attribute of sovereignty but it is absolutely necessary to the support of Government, the maintenance of law and order and the protection of life and property. It is not to be supposed that the power to tax would be subordinated to the claim of any creditor however meritorious that claim may be.

The petitioners here, and the referee and District Court below in this case, relied upon certain language used by this court in an opinion by Mr. Justice McReynolds in *City of Richmond* v. *Bird et al.*, 249 U. S. 174, 177:

> Section 64a directs that taxes be paid in advance of dividends to creditors; and "dividend" as commonly used throughout the Act means partial payment to general creditors.

But in that case the construction of the language of section 64a, "in advance of the payment of dividends to creditors," was in no wise involved. The language used, therefore, was *obiter dictum;* and

even as such it does not purport to construe the meaning of the word "dividends" as used in Section 64a, but says merely, in passing, that the word "dividend," as commonly used throughout the Act, "means partial payment to general creditors." Unquestionably it may be conceded that it is used in that sense generally throughout the Act, but certainly it would not necessarily follow therefrom that it is so used in section 64a, particularly when the context in which it is employed in Section 64a indicates that the word "dividends" is there used in its usual and ordinary meaning.

Still other language is employed in section 64a to indicate the intent of Congress that taxes are to have priority over wages. We refer to the phrase *"except as herein provided"* as used in the first clause of subdivision *b* of section 64. That clause is:

> The debts to have priority, *except as herein provided,* and to be paid in full out of bankrupt estates, and the order of payment shall be * * * .

The words *" except as herein provided "* can only refer to that which was provided in the preceding subdivision of the section, namely, subdivision *a*, since it is only that subdivision of the section which purports to refer to any other priority than those contained in subdivision *b*. These words show a clear recognition of the fact that subdivision *a* does create a priority and that that priority is to precede, at least, any priority of creditors created by

subdivision *b*. Certainly, the phrase "*except as herein provided*" normally would be held to refer to some other provision in the same section. Any doubt that it refers to what is contained in the preceding part of the section—that is to say, in subdivision *a*—will be wholly removed when the legislative history of section 64 is hereinafter discussed and the several stages of its evolution are consecutively set out. There will then be no doubt that this phrase refers only to the priority created in the preceding subdivision of the section.

The meaning of section 64, as it thus appears from the language employed, is consistent with the established public policy of the United States as to its prior right to payment of taxes due it from the estates of bankrupts. A clear reversal of that policy would be indicated by such a construction of section 64 as would subordinate taxes not only to wage claims but also to the claims described in clause 5 of subdivision *b* of section 64, to wit:

> (5) debts owing to any person who by the laws of the States or the United States is entitled to priority.

It would be hard indeed to explain why Congress would have intended to subordinate taxes due the sovereign *to any debt of the bankrupt whatsoever that any State might by law declare entitled to priority*. Such, however, is the necessary conclusion from the construction contended for in this case by petitioners. That the established public policy of the United States has always preferred taxes due

the United States over claims to creditors of bankrupt estates appears clearly from a consideration of the statutes preceding that of 1898 governing bankruptcy proceedings.

The first bankruptcy statute was that of 1800 (2 Stat. 19). Section 62 of that Act, the only section of the Act establishing any priority whatever, provided:

> That nothing contained in this law shall, in any manner, effect the right of preference to prior satisfaction of debts due to the United States as secured or provided by any law heretofore passed, nor shall be construed to lessen or impair any right to, or security for, money due to the United States or to any of them.

The second Bankruptcy Act, that of August 19, 1841 (5 Stat. L. 440), provided in section 5:

> That all creditors coming in and proving their debts under such bankruptcy, in the manner hereinafter prescribed, the same being bona fide debts, shall be entitled to share in the bankrupt's property and effects, *pro rata*, without any priority or preference whatsoever, except only for debts due by such bankrupt to the United States, and for all debts due by him to persons who, by the laws of the United States, have a preference, in consequence of having paid moneys as his sureties, which shall be first paid out of the assets; and any person who shall have performed any labor as an operative in the service of any bankrupt shall be entitled to re-

ceive the full amount of the wages due to him for such labor, not exceeding twenty-five dollars: * * *.

The Bankruptcy Act of 1867 (14 Stat. 517) provided in section 28 thereof that:

> In the order for a dividend, under this section, the following claims shall be entitled to priority or preference, and to be first paid in full in the following order—
>
> First. The fees, costs, and expenses of suits, and the several proceedings in bankruptcy under this act, and for the custody of property, as herein provided.
>
> Second. All debts due to the United States, and all taxes and assessments under the laws thereof.
>
> Third. All debts due to the State in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws of such State.
>
> Fourth. Wages due to any operative, clerk, or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy.
>
> Fifth. All debts due to any persons who, by the laws of the United States are or may be entitled to a priority or preference, in like manner as if this act had not been passed: *Always provided,* That nothing contained in this act shall interfere with the assessment and collection of taxes by the authority of the United States or any State.

It is clear from the foregoing that the construction of section 64 now urged by us is in conformity with each of the Bankruptcy Acts theretofore enacted by Congress, so far, at least, as concerns the question of whether taxes due the United States are entitled to priority over any demands of creditors.

II

The legislative history of section 64 indicates priority of taxes

Any doubt as to the intention of Congress that taxes should have precedence over wages in order of payment out of a bankrupt's estate will be removed by a consideration of the legislative history of section 64.

The *"Act to establish uniform laws on the subject of bankruptcy throughout the United States"* was introduced in the first session of the Fifty-fifth Congress by Mr. Lindsay, of Kentucky, as Senate bill 1035. It was referred to the Senate Committee on the Judiciary (vol. 30, Cong. Rec., 55th Cong., 1st sess., p. 118), and was reported favorably to the Senate without amendment (vol. 30, Cong. Rec., 1st sess., p. 155). In its original form, as thus introduced and thus reported, what is now section 64 (then section 65) read as follows:

> SEC. 65. *Debts which have priority.—a.* Debts owing to the United States, a State, county, parish being a political corporation, district, or municipality, after being proved

and allowed, shall have priority only in the event and to the extent that they constitute a lien upon the property of the estate.

b. The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed $300 to each claimant; and (5) debts owing to any person which by the laws of the United States or a State are entitled to priority.

It will be noted that in its original form section 64 was in its present form exactly, except that in its original form subdivision *a* referred *not to taxes,* but to *debts* owing to the United States and various named political subdivisions, and provides that such *debts* should have priority " *only in event*

and to the extent that they constitute a lien upon the property of the estate." Obviously, however, the word "*debts*" as used in the original form of subdivision *a* included "taxes." In reality, therefore, the only distinction between subdivision *a* in its original form and in its present form is that in the original form "taxes" or "debts owing to the United States" had priority over wages (and other claims mentioned in subdivision *b*) *only if they had become liens upon the property.*

The act as reported by the Senate Judiciary Committee was not adopted by the Senate. Instead, a substitute offered by Senator Nelson was adopted (vol. 30, Cong. Rec., 55th Cong., 1st sess., p. 801), the part thereof dealing with the subject matter of section 64 being as follows (vol. 30, Cong. Rec., 1st sess., p. 809):

> SEC. 9. That the following debts shall have preference, in the order named, over other debts in the distribution of the estate of the bankrupt, to wit:
>
> First. Debts due to the servants and laborers employed by the bankrupt for labor performed or services rendered within six months prior to the filing of said petition.
>
> Second. Taxes or revenues due the United States.
>
> Third. Taxes due any State or Territory or the District of Columbia.
>
> Fourth. Taxes due any county, parish, town, city, or village, in the order named.

> But none of such debts shall be recognized or paid unless duly proved and allowed, as prescribed in reference to other debts and claims against the bankrupt.

The Nelson substitute was sent to the House of Representatives, there referred to the House Committee on the Judiciary (vol. 30, Cong. Rec., 1st sess., p. 840), which committee reported in lieu of the Senate bill what was known as the Henderson substitute (vol. 31, Cong. Rec., 55th Cong., 2d sess., p. 233). The bill in this form was essentially the bill as originally introduced in the Senate by Mr. Lindsay, which, with some minor changes, made by a conference committee, was adopted and signed. So far as section 64 in concerned, it underwent no further changes after those made by the Henderson substitute.

When the Henderson bill was reported by the House Committee on the Judiciary, it was accompanied by an explanation, a part of which referred to section 64 (H. R. No. 65, 55th Cong., 2d sess., p. 27), which read as follows:

> Under the head of "debts which have priority" a provision is recommended requiring trustees to recognize, first, taxes due to the United States, State, county, district or municipality, to be paid before any dividend is paid to the creditors. *This to apply whether the taxes are a lien or not upon property.* [Italics ours.]

In other words, the committee explained that the priority in payment of taxes was not to be affected (as in the original Senate bill) by the fact that they had or had not become liens.

We have then before us the three stages in the evolution of this section:

1. The original Senate bill, in which, in subdivision *a* of section 64, priority is unquestionably given to "debts owing to the United States," provided they have become liens, and in which the phrase in subdivision *b* "*except as herein provided,*" clearly refers to the provision made in subdivision *a* as to the priority of the "debts" described in subdivision *a*.

2. The Nelson substitute, which unquestionably gave "wages" priority over "taxes."

3. The Henderson substitute, following the rejection of the Nelson substitute, reinstating section 64 as originally introduced, except that priority as to "debts" was limited to "taxes," and as to "taxes" was extended to include all taxes "even though not reduced to liens."

In short, the original Senate bill undoubtedly gave taxes priority over wages. The Nelson substitute undoubtedly gave wages priority over taxes. The final adoption of what was practically the original Senate bill, with but one change in section 64 thought worthy of explanation by the House Committee on the Judiciary (and that a change which improved the priority of taxes),

shows the clear intention of Congress that all taxes should be paid before wages.

This legislative history of section 62, moreover, shows beyond any doubt that the phrase in subdivision *b*, *" except as herein provided,"* refers to the priority set up in favor of the United States and the various political subdivisions named in subdivision *a*.

III

The decided cases give priority to taxes

The construction of section 64, indicated by the language used in it and by its legislative history, is the construction which has received the approval of the courts, including this court.

In *Guarantee Title & Trust Co.* v. *Title Guaranty & Surety Co.* (224 U. S. 152, 159), the court, speaking through Mr. Justice McKenna and referring to section 64, said:

> Labor claims are given priority, and it is provided that debts having priority shall be paid in *full. The only exception is " taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality." These were civil obligations, not personal conventions, and preference was given to them,* but as to debts we must assume a change of purpose in the change of order. (Italics ours.)

While the question involved in that case was as to whether wages had priority over debts, other than taxes, due the United States, and therefore

while the language quoted may be said to be *obiter dictum,* it nevertheless clearly presented the obviously carefully considered view of the court as to priority of taxes over all claims of creditors, a view which no language in later decisions of the court calls in question.

In addition to the language of this court in the *Guarantee Title & Trust Company* case, we have the decisions of the Circuit Court of Appeals for the Sixth Circuit, the Seventh Circuit, and, in the present case, the Ninth Circuit.

The Court of Appeals for the Sixth Circuit in the case of *City of Chattanooga* v. *Hill,* 139 Fed. 600, speaking through Lurton, Circuit Judge, said:

> *The priority of taxes is provided for by section 64a. If paid only as a secured debt of the kind referred to in 64b, taxes would be postponed not only to costs of administration but to workmen, clerks, and servants' wages.* Congress evidently meant that the sovereign should neither be postponed nor delayed in the collection of taxes, and therefore provided that the trustee should pay all taxes due and owing by the bankrupt in advance of dividends. (Italics ours.)

The Circuit Court of Appeals for the Seventh Circuit in *In re Jacobson,* 263 Fed. 883, speaking through Evans, Circuit Judge, said:

> If petitioner's claim is entitled to priority, it must then be by virtue of section 64a of the Bankruptcy Act. Its claim, being for a tax, is entitled to the preference and priority which this section provides. But

what is the priority thus created? Clearly priority over claims of other "creditors." This section directs payment of these taxes "in advance of the payment of dividends to creditors." "Creditors" of the bankrupt are not entitled to dividends until the taxes are paid. No recognition of priority in favor of taxes appears, except as to creditors. Who, then, are the "creditors" of whose claims Congress was speaking? Having defined the term "creditor" by a previous section, it was no doubt making use of its own definition, in thus using the term in section 64a. "'Creditors' shall include any one who owns a demand * * * provable in bankruptcy." Thus Congress by section 1, subd. 9, of the Act, comprehenively designates the class known as creditors, the class whose claims are subject to the claims of "the United States, State, county, district, or municipality" for taxes.

For the latest expression of the opinion of the Court of Appeals for the Seventh Circuit, see the Appendix herein.

The language of the Circuit Court of Appeals for the Ninth Circuit in the present case, holding that taxes have priority under Section 64 over wages, is set out in the transcript of the record on pages 61–63, inclusive.

In addition to the decisions by this court and by the Circuit Courts of Appeals just referred to, there have been numerous District Court decisions to the same effect. We refer to *In re Fountain*, 295 Fed. 873, decided by the District Court for the

Southern District of New York; *In re Waterman Mfg. Co.,* 291 Fed. 589, 594, decided by the District Court of Maine; *In re Kittenplan,* 285 Fed. 62, decided by the District Court for the Southern District of New York; *In re Anderson,* 275 Fed. 397, decided by the District Court for the Southern District of New York; *In re Weissman,* 178 Fed. 115, decided by the District Court of Connecticut; *In re Cramond,* 145 Fed. 966, 975, decided by the District Court of the Northern District of New York; and *In re Prince & Walter,* 131 Fed. 546, 549, decided by the District Court for the Middle District of Pennsylvania.

We quote from one of these cases only, the last of them to be decided, *In re Fountain, supra,* in which the question involved was identical with the one involved in the present case and in which the court said:

> In respect to the priority which taxes are given by section 64a of the Bankruptcy Act, I think it relates only to a priority over payments to creditors of the estate, and not over administration expenses. Subdivision "a," supra, directs the court to order the trustee to pay all taxes "in advance of the payment of dividends to creditors." These dividends to creditors embrace debts to preferred creditors as well as to general creditors. If, for example, the only creditors of a bankrupt estate were workmen entitled to a preference, the payment to them would be as much a dividend as one to general creditors, entitled to no priority. Section 1,

subd. 9, of the Bankruptcy Act (Comp. St. (§9585), defines "creditor" as including "any one who owns a demand * * * provable in bankruptcy." (Section 56b Comp. St. §9640) specifically defines as "creditors" persons "holding claims which are secured or have priority." I therefore reach the conclusion that subdivision "a" only gives priority to taxes as against debts (whether ordinary or preferred) due creditors of the bankrupt, but not as against necessary obligations of the receiver or trustee. This reasoning construes section 64 of the Bankruptcy Act as giving a preference to taxes over the items 4 and 5 of subdivision "b" but not over the items 1, 2, and 3 of subdivision "b"; that is, it gives taxes no priority over expenses of administration, but does give them priority over wage claims.

The Circuit Court of Appeals of the Third Circuit has held that administration expenses are entitled to priority in bankruptcy over taxes. *New Jersey* v. *Lovell* 179 Fed. 321; petition for certiorari denied 219 U. S. 587. The Circuit Court of Appeals of the Seventh Circuit recently reached the same conclusion. *Matter of Jacobson* (C. C. A.), 263 Fed. 883. My conclusion as to the priority of taxes over wage claims is in accord with the recent decision of Judge Knox in the case of *In re Kittenplan* (D. C.), 285 Fed. 62, and of the Circuit Court of Appeals of the Ninth Circuit in *West Coast Rubber Corporation,* 290 Fed. 160.

Only one decided case (in addition to the decision of the District Court in this case) presents a

view contrary to that supported by the great weight of authority as hereinabove indicated. That case is *In re Enterprise Brass Foundry* (293 Fed. 69), decided by the District Court of the Western District of Washington, opinion by Neterer, District Judge. The opinion is a single short paragraph in which the court held that wages had preference over taxes. In support of its decision the court cited the *Guarantee Title & Trust Company case, supra,* which as we have already seen, supports a conclusion directly the opposite to that for which it is cited by Judge Neterer.

The cases indicate a difference of opinion as to whether taxes have priority also over administration costs, but, except for the case mentioned, no difference of opinion as to the one question here, whether taxes have priority over wages. We do *not* concede that taxes do not have priority even over costs of administration, as some of the courts have held, but we are not here concerned as to that and do not debate it.

IV

The commentators on the Bankruptcy Act

All the text writers who have discussed the Bankruptcy Act assert that by it "taxes" are given priority over "wages." Without quotation, we refer to Remington on Bankruptcy (3d ed., sec. 2786), Brandenberg on Bankruptcy (4th ed., sec. 1347), Black on Bankruptcy (1914 ed., sec. 621), and Collier on Bankruptcy (4th ed., p. 972).

In support of their statements to the effect that taxes have priority in payment out of an estate of a bankrupt, these writers refer to the cases cited by us in Subdivision III of this argument.

V

CONCLUSION

We respectfully submit that the decision below should be affirmed. Clearly the intention of Congress—by section 64—was to give priority to tax claims either of the United States or any of the political subdivisions of the United States therein named. Such is the plain meaning of the language used in that section; the legislative history of the section corroborates that construction; the great weight of authority supports it.

JAMES M. BECK,
Solicitor General.
MERRILL E. OTIS,
Special Assistant to the Attorney General.
FEBRUARY, 1925.

APPENDIX

At the January, 1924, session of the October, 1923, term, the United States Circuit Court of Appeals for the Seventh Circuit handed down its opinion in the case of *John C. Cannon, Collector,* v. *Frank M. McKey, Trustee in Bankruptcy.*

The case involved the exact point involved in the present case. After the decision of the case a petition for rehearing and stay of proceedings was filed. Proceedings were stayed pending the decision in this case by this court. For that reason the case has not been reported.

The opinion follows:

> EVANS, *Circuit Judge:* Does the claim of the Government for taxes take precedence, under the Bankruptcy Act, to wage claims?
>
> This is the sole question presented by the record before us.
>
> Much refinement of distinction over "taxes" and "debts" might be attempted, and the purpose of legislation preferring taxes, could be pointed out; but as we view this question, it is one of statutory construction with recognized objects and purposes as a background.
>
> Considering sections 3466 and 3186 of the Revised Statutes, as well as sections 64(a) and 64(b) of the Bankruptcy Act, the conclusion that taxes were placed ahead of all other debts, seems unadvoidable. The language of section 3466 admits of no exception.
>
> "Whenever any person indebted to the United States is insolvent, * * * the debts to the United States shall be first satisfied."

The Bankruptcy Act confirms this expression of public policy. Section 64(a) provides:

"The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, * * * in advance of the payment of dividends to creditors, * * * ."

This provision not only is declarative of the policy of the Government respecting taxes due it, but lays down a rule of practice governing the distribution of the assets of a bankrupt estate. It provides the authority for those in charge to proceed, before questions of payment of dividends arise, to pay and to pay promptly the taxes due the sovereign.

The dividends referred to are not merely those payable to general creditors, but include any dividend. It is urged that a dividend is a partial payment of a claim, and does not contemplate a payment in full. Yet the Congress was speaking of dividends in the abstract, and the present case is an illustration of the possibility of a dividend being paid to a wage earner preferred by section 64(b).

Moreover, there is much of merit in Judge Gilbert's observation in *United States* v. *Oliver*, 290 Fed. 160:

"It is true that the term 'dividends to creditors' ordinarily refers to dividends to general creditors. But it does not necessarily have that meaning. A dividend is that which is to be divided. In bankruptcy it is the sum of money which is to be divided among two or more creditors. It is not necessarily a partial payment. It is obvious that it may at times be a payment in full even as to general creditors." These con-

clusions find support in the language of various decisions; for example, in *Guarantee Co.* v. *Title Guaranty Co.*, 224 U. S. 152, the court said:

Labor claims are given priority, and it is provided that debts having priority shall be paid in *full.* The only exception is 'taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality.'"

In *In re Jacobson,* 263 Fed. 883, this court said:

"Sections 64a and 64b of the Bankruptcy Act are *in pari materia* with section 3466. Debts due the United States, other than taxes are not given the same protection in the two cited sections of the Bankruptcy Act as existed under the general statute, section 3466, or under the Bankruptcy Act of 1867."

See, also, *United States* v. *Oliver,* 290 Fed. 160; *In re Kittenplan,* 285 Fed. 62; *In re Weissman,* 178 Fed. 115; Remington on Bankruptcy, 2nd Ed., sec. 2190; Black on Bankruptcy, sec. 621.

The order is reversed with directions to enter a decree directing the payment of the taxes.

The conclusions herein reached were concurred in by Judge Baker before his death.

○

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1924.

A. J. OLIVER, AS TRUSTEE, ET AL. *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 180. Submitted March 2, 1925.—Decided April 13, 1925.

Under § 64 of the Bankruptcy Act, federal and state taxes are to be paid in full before paying claims for preferred wages, unless it clearly appear that the particular tax in question has been subordinated to such claims by some relevant federal or local law. *City of Richmond* v. *Bird*, 249 U. S. 174.
290 Fed. 160, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals which reversed a judgment of the District Court giving wages priority over taxes in a bankruptcy case. See 283 Fed. 351.

Messrs. Reuben G. Hunt and *Lewis V. Crowley* for petitioners.

The Solicitor General and *Mr. Merrill E. Otis*, Special Assistant to the Attorney General, for the United States.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The bankrupt's estate consisted of personal property only, and there is no suggestion of a lien thereon to se-

cure any of the claims now under consideration. The fund derived from conversion of all the property is insufficient fully to satisfy taxes due the United States and the City and County of San Francisco, and the allowed claims for preferred wages. Which of these must be paid first is the question for decision. The referee ruled in favor of the wages, and the District Court approved; but the Circuit Court of Appeals held to the contrary and directed that priority should be given the taxes.

The Bankruptcy Act of 1898, c. 541, 30 Stat. 544, 563, provides—

"Sec. 64. *Debts which have priority.*—*a.* The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

"*b.* The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) wages due to workmen, clerks, or servants which have been earned within three months before the date of the com-

mencement of proceedings not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority."

Guarantee Co. v. *Title Guaranty Co.*, 224 U. S. 152, 159, 160, held that under § 64 wages were entitled to priority over the claim of the United States for damages occasioned by the bankrupt's failure to comply with a construction contract. It was there said—

"By the statute of 1797 (now Sec. 3466) and Sec. 5101 of the Revised Statutes all debts due to the United States were expressly given priority to the wages due any operative, clerk, or house servant. A different order is prescribed by the Act of 1898, and something more. Labor claims are given priority, and it is provided that debts having priority shall be paid in *full*. The only exception is 'taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality.' These were civil obligations, not personal conventions, and preference was given to them, but as to debts we must assume a change of purpose in the change of order. And we cannot say that it was inadvertent. The Act takes into consideration, we think, the whole range of indebtedness of the bankrupt—national, State and individual—and assigns the order of payment. The policy which it dictated was beneficent and well might induce a postponement of the claims, even of the sovereign, in favor of those who necessarily depended upon their daily labor. And to give such claims priority could in no case seriously affect the sovereign. To deny them priority would in all cases seriously affect the claimants."

In *City of Richmond* v. *Bird*, 249 U. S. 174, 177, past due taxes were denied priority of payment over a debt secured by a lien which the state law recognized as superior to the city's claims for such taxes. We said—

"Respondents therefore must prevail unless priority over their lien is given by Sec. 64a to claim for taxes

which, under State law, occupied no better position than one held by a general creditor. Section 67d, Bankruptcy Act, quoted *supra*, declares that liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, shall not be affected by it. Other provisions must, of course, be construed in view of this positive one. Section 64a directs that taxes be paid in advance of dividends to creditors; and 'dividend,' as commonly used throughout the Act, means partial payment to general creditors. In Sec. 65b, for example, the word occurs in contrast to payment of debts which have priority. And as the local laws gave no superior right to the City's unsecured claim for taxes we are unable to conclude that Congress intended by Sec. 64a to place it ahead of valid lien holders."

Of course, this opinion must be read in the light of the question under consideration—Does § 64 require that taxes shall be paid in advance of debts secured by liens which under the local law are superior to claims for such taxes? We pointed out that § 67d preserves valid liens and is not qualified by the direction of § 64a to discharge taxes "in advance of the payment of dividends to creditors," since "'dividend', as commonly used throughout the Act, means partial payment to general creditors." We did not undertake to decide in what order, as among themselves, taxes and the debts specified by § 64 should be satisfied; that point was not presented.

The language of § 64 has caused much uncertainty; and widely different views of its true meaning may be found in the opinions of District Courts and Circuit Courts of Appeals.

Paragraph "a" directs that "the court shall order the trustee to pay all taxes legally due and owing . . . in advance of [*not next preceding*] the payment of dividends to creditors"—that is, partial payments to general creditors. *City of Richmond* v. *Bird, supra.* It does not un-

dertake otherwise to fix the precise position which shall be accorded to them. This, we think, must be determined upon consideration of the circumstances of each case and the provisions of relevant federal and local laws—e. g., those which prescribe liens to secure or special priority for tax claims. It also appears, plainly enough, that all debts mentioned in Paragraph "b" must be satisfied before any payment to general creditors.

Guarantee Co. v. *Title Guaranty Co., supra,* declares that the taxes of Paragraph "a" are "civil obligations, not personal conventions, and preference was given to them" over the wages specified by Clause (4), Paragraph "b". We adhere to this as a correct statement of the general rule to be followed whenever it does not clearly appear that the particular tax has been subordinated to claims for wages by some relevant law.

We find no error in the action of the court below. The cause will be remanded to the District Court for further proceedings consistent with this opinion.

Affirmed.